

United States
Circuit Court of Appeals

For the Ninth Circuit. 16

THE EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LIMITED OF LON-
DON, ENGLAND,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY,
a Corporation,

Defendant in Error.

Transcript of Record.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT OF THE DISTRICT OF OREGON.

FILED

MAY 19 1926

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LIMITED OF LON-
DON, ENGLAND,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY,
a Corporation,

Defendant in Error.

Transcript of Record.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT OF THE DISTRICT OF OREGON.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Answer	21
Amended Bill of Exceptions.....	71
Appeal Bond on Writ of Error and Supersedeas	66
Assignments of Error.....	59
Certificate of Clerk U. S. District Court to Transcript of Record.....	114
Citation on Writ of Error.....	1
Complaint	5
Cost Bill	56
Demurrer and Reply to Answer.....	38
Demurrer to Reply.....	41
 EXHIBITS:	
Exhibit "A" (Accident Insurance Policy Issued to Portland Railway, Light & Power Company by Employers' Li- ability Assurance Corporation, Ltd., of London, England)	12
Plaintiff's Exhibit No. 1 — Stipulation Dated October 20, 1925.....	76
Plaintiff's Exhibit No. 2—Complaint in Cause Entitled James A. Freeborough vs. Portland Railway, Light & Power Co.	84

Index	Page
Plaintiff's Exhibit No. 3—Notice of Rejection Dated November 14, 1923, Portland Railway, Light and Power Company to State Industrial Accident Commission	87
Findings of Fact and Conclusions of Law.....	47
Judgment Order	108
Minutes of Court—December 29, 1924—Order Re Motion to Strike Out Parts of Amended Answer	37
Minutes of Court—February 9, 1925—Order Overruling Demurrer to Reply.....	42
Minutes of Court—October 23, 1925—Order Directing Trial of Cause Without Jury.....	45
Minutes of Court—April 6, 1926—Order Allowing Writ of Error.....	65
Motion to Strike Out Parts of Amended Answer	36
Names and Addresses of Attorneys of Record	1
Objections to Findings of Fact, Conclusions of Law and Judgment Order Requested by Plaintiff	109
Opinion (October 27, 1924).....	17
Opinion (February 9, 1925).....	43
Opinion (March 1, 1926).....	46
Order Allowing Writ of Error.....	65
Order Directing Trial of Cause Without Jury..	45
Order Overruling Demurrer to Reply.....	42
Order Re Motion to Strike Out Parts of Amended Answer	37
Petition for Writ of Error.....	57

Index	Page
Praeipce for Transcript of Record.....	69
Requests for Findings of Fact and Conclusions of Law and Judgment Order.....	89
Stipulation Re Hearing on Writ of Error at October Session of Court of Appeals.....	69
Stipulation Waiving Jury Trial.....	44
TESTIMONY ON BEHALF OF PLAIN- TIF:	
FREEBOROUGH, JAMES ARTHUR...	78
Cross-examination	81
Redirect Examination	82
Writ of Error.....	3

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

WILBUR, BECKETT, HOWELL & OPPEN-
HEIMER, Board of Trade Building, Portland,
Oregon,

For the Plaintiff in Error.

GRIFFITH, PECK & COKE, Electric Building,
Portland, Oregon,

For Defendant in Error.

In the District Court of the United States for the
District of Oregon.

PORTLAND ELECTRIC POWER COMPANY,
a Corporation,

Plaintiff,

vs.

THE EMPLOYERS LIABILITY ASSURANCE
CORPORATION LIMITED OF LONDON,
ENGLAND, a Corporation,

Defendant.

CITATION ON WRIT OF ERROR.

To the United States of America, Ninth Judicial
District, to Portland Electric Power Company,
a Corporation, GREETING:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit, at San Francisco, Cali-
fornia, within thirty days from date hereof, pursu-
ant to writ of error filed in the Clerk's office of the

United States District Court for the District of Oregon, wherein said The Employers Liability Assurance Corporation Limited of London, England, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable CHARLES E. WOLVERTON, Judge of the United States District Court for the District of Oregon, this 6th day of April, 1926.

CHAS. E. WOLVERTON,
United States District Judge. [1*]

United States of America,
District of Oregon,—ss.

Due and timely service of the within citation and the receipt of a duly certified copy thereof, all at the city of Portland in the District of Oregon, is hereby admitted.

GRIFFITH, PECK & COPE,
By CASSIUS R. PECK,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 8, 1926. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

WRIT OF ERROR.

The United States of America,—ss.

The President of The United States of America, To
the Judge of the District Court of the United
States for the District of Oregon, GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before the Honorable Charles
E. Wolverton, one of you, between Portland Elec-
tric Power Company, a corporation, plaintiff and
defendant in error, and The Employers Liability
Assurance Corporation, Limited of London, Eng-
land, a corporation, defendant and plaintiff in er-
ror, a manifest error hath happened to the great dam-
age of the said plaintiff in error, as by complaint
doth appear; and we, being willing that error, if
any hath been, should be duly corrected, and full
and speedy justice done to the parties aforesaid,
and, in this behalf, do command you, if judgment
be therein given, that then, under your seal, dis-
tinctly and openly, you send the record and pro-
ceedings aforesaid, with all things concerning the
same, to the United States Circuit Court of Appeals
for the Ninth Circuit, together with this writ, so
that you have the same at San Francisco, California,
within thirty days from the date hereof, in the said
Circuit Court of Appeals to be then and here held;
that the record and proceedings aforesaid, being then
and there inspected, the said Circuit Court of Ap-

4 *Employers Liability Assur. Corp. Ltd., etc.,*

peals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 6th day of April, 1926.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States
for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: Filed April 6th, 1926. [3]

In the District Court of the United States for the
District of Oregon.

July Term, 1924.

BE IT REMEMBERED, That on the 15th day of July, 1925, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit:
[4]

In the District Court of the United States for the
District of Oregon.

PORTLAND ELECTRIC POWER COMPANY,
a Corporation,

Plaintiff,

vs.

THE EMPLOYERS LIABILITY ASSURANCE
CORPORATION LIMITED OF LONDON
ENGLAND, a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff and for its cause of complaint against the defendant complains and alleges:

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, organized and existing under the laws of Great Britain, is a subject of Great Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action exceeds Three Thousand Dollars (\$3,000.00), exclusive of costs and interest.

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred Dollars (\$7500.00) against damages resulting from bodily injuries [5] accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained. That attached hereto made a part hereof and marked Exhibit "A" is said contract of insurance.

V.

That said contract, except for the breaches of the defendant as hereinafter alleged, is now and has been at all times since April 29, 1922, in full force and effect, and this plaintiff has complied with each and every condition thereof by it undertaken.

VI.

That the freight elevator located in said Electric Building, and whereon and in connection with which

bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item 3 of the declarations of said Exhibit "A."

VII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floor of said elevator and the said walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit "A" under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit "A," to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative immediate [6] medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extend of \$7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom.

IX.

That immediately upon the happening of said

accident, the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant refused so to do and denied any and all liability on account of or growing out of said accident.

X.

That upon the happening of said accident, the plaintiff incurred certain expenses for the imperative immediate medical and surgical relief of the said James A. Freeborough; that said medical and surgical relief was of the reasonable value of \$500.00.

XI.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his said injuries, resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19, 1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XII.

That immediately thereafter, on February 19, 1924, this plaintiff delivered said complaint and summons to the defendant and requested it to *defendant* said suit in accordance with the terms and provisions of said Exhibit "A." [7]

XIII.

That thereafter, on February 23, 1924, this de-

fendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIV.

That the allegations of said complaint charging the negligence of this plaintiff as the proximate cause of his injuries were true, and the sum of \$8,000.00 was a fair and reasonable compensation for the injuries and damages resulting to said James A. Freeborough from and on account of said accident.

XV.

That thereafter, acting in the best interest of both the plaintiff and defendant herein, this plaintiff as defendant in said suit, filed in said court and cause its confession, whereby it confessed judgment in the sum of \$8,000.00 and thereafter on June —, 1924, a judgment in the sum of \$8,000.00 was duly entered in said cause in favor of said James A. Freeborough and against this plaintiff as defendant therein.

XVI.

That immediately thereafter this plaintiff demanded of the defendant that it satisfy said judgment to the extent of \$7,500.00 and that it reimburse this plaintiff for said expense of \$500.00, incurred by the plaintiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its

denial of any and all liability arising or growing out of said accident.

XVII.

That upon the refusal of the defendant to settle and satisfy said judgment to the extent of \$7,500.00, this plaintiff did, on July 10th, 1924, in the necessary protection of its property from sale upon execution, settle and pay said judgment [8] by the payment to the said James A. Freeborough of \$7,500.00 in cash and by the delivery to him of an order for future surgical and medical service by the surgical and medical staff of this plaintiff.

XVIII.

That in so denying liability under said Exhibit "A" and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of \$7,500.00, as provided by said Exhibit "A," and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of \$7,500.00, as provided in said Exhibit "A," and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of \$500.00, this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of \$8,000.00; that the defendant

refuses to pay the plaintiff said sum of \$8,000.00, or any part thereof.

WHEREFORE, this plaintiff demands judgment against the defendant in the sum of \$8,000.00, with interest at the rate of 6% per annum from July 10th, 1924, together with its costs and disbursements herein.

GRIFFITH, LEITER & ALLEN,
Attorneys for Plaintiff. [9]

State of Oregon,
County of Multnomah,—ss.

I, R. W. Shepherd, being first duly sworn, depose and say that I am the Assistant Secretary of Portland Electric Power Company, a Corporation, plaintiff in the above-entitled action; and that the foregoing complaint is true, as I verily believe.

R. W. SHEPHERD.

Filed July 15, 1924. [10]

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED

of London, England

GENERAL LIABILITY POLICY.

(Hereinafter called the Corporation) hereby agrees with the Assured named in the Declarations attached hereto, and made a part hereof, as respects bodily injuries, including death at any time resulting therefrom, covered by this Policy and accidentally sustained by any person or persons, as follows :

Insurance Provided.

Agreement I.

- (a) To settle or to defend in the manner hereinafter set forth against claims resulting from the liability imposed upon the Assured by law for damages on account of such injuries.
- (b) To pay and satisfy judgments rendered against the Assured in legal proceedings defended by the Corporation and to protect the Assured against the levy of executions issued against the Assured upon the same, all subject to the limits expressed in Item 4 of the Declarations.
- (c) To pay all expenses incurred by the Corporation for investigation, negotiation, and defense of any such claims or proceedings; the expense incurred by the Assured for such immediate medical or surgical relief as shall be imperative at the time any such injuries are sustained; all premiums on attachment and/or appeal bonds required in any such proceedings; all costs taxed against the Assured in any such proceedings; and all interest accruing before or after entry of judgment and up to the date of payment by the Corporation of its share of any judgment.
- (d) The insolvency or the bankruptcy of the Assured shall not relieve the Corporation from the payment of such amount hereunder as respects any such injuries sustained before such insolvency or bankruptcy as would have been payable but for such insolvency or bankruptcy. If, because of such insolvency or bankruptcy, an execution against the Assured is returned unsatisfied in an action brought to recover damages on account of any such injuries sustained before such insolvency or bankruptcy by the Injured or by any other persons claiming by, through or under the Injured, then an action may be maintained by the Injured, or by such other persons claiming by, through or under the Injured, against the Corporation, subject to the provisions and the limits of this Policy, for the amount of the judgment in said action.

Service.

Agreement II. To serve the Assured,

- (a) by inspection of the premises, the elevators and the machinery and appliances connected therewith covered by this Policy when and as deemed advisable by the Corporation, and thereupon to suggest to the Assured such changes or improvements as may operate to reduce the number or the severity of such injuries, and,
- (b) by investigation of such injuries and by settlement or defense of any resulting claims in accordance with the provisions of this Policy.

Defense.

Agreement III. To defend as in this Policy provided in the name and on behalf of the Assured any suits or other proceedings alleging such injuries and demanding damages on account thereof which may at any time be instituted against the Assured on account of such injuries, although such suits, proceedings, allegations, and demands are wholly groundless, false or fraudulent.

Coverage.

Agreement IV. This Policy covers, except as provided in Agreement V., bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition.

Exclusions.

Agreement V. This Policy shall not cover injuries or death,

- (1) caused to or by any person employed by the Assured (a) contrary to law, or (b) under fourteen (14) years of age, or (c) under sixteen (16) years of age if in charge of or operating any elevator; or,
- (2) sustained by any person or persons while in, entering upon, or alighting from, the ear of any elevator, or caused by the maintenance, the operation or the use of any elevator, or by goods, materials or merchandise while being carried thereon, or caused by the existence of the elevator well, shaft or hoistway thereof, or appliances, appurtenances, or attachments contained therein, or machinery directly connected therewith unless such elevator is specifically described in Item 3 of the Declarations; or,
- (3) caused (a) by any horse or any draught animal, any motor or other vehicle (except hand-propelled vehicles on the said premises) owned, hired, or borrowed by the Assured, or (b) by any person while driving, loading, unloading or using the same, or (c) by any animal away from the said premises; or,
- (4) caused by the consumption, the use, or the installation of goods outside of and away from the premises described in the Declarations; or,
- (5) growing out of or due to the making of additions to, structural alterations in, or extraordinary repairs of the said premises unless a written permit is granted by the Corporation specifically describing the work and an additional premium is paid therefor;
- * (6) to any employee of the Assured under any Workmen's Compensation Act or Law.

Policy Period.

Agreement VI. This Policy covers only such injuries so sustained by reason of accidents occurring within the Policy period as stated in Item 2 of the Declarations.

Limitation of Liability.

Agreement VII. The Corporation's liability under this Policy is limited as expressed in Item 4 of the Declarations, and said limits shall apply to each elevator covered hereby. If there be more than one named in the Declarations as Assured the said limits shall be available to them jointly but not to more than one of them severally.

The Foregoing Agreements are Subject to the Following Conditions :

Basis of Premium.

Condition A. The premium for this Policy is as expressed in Item 3 of the Declarations except as this Policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration (by which term is meant all salaries, wages, earnings for overtime, piece work or contract work, bonuses or allowances, also the cash equivalent of all merchandise, store certificates, credits, board or any other substitute for cash) earned during the Policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations. At the end of the Policy period, the actual amount of the remuneration earned by all said persons during such period shall be exhibited to the Corporation, as provided in Condition "C" hereof, and the earned premium adjusted in accordance therewith at the rates and under the conditions herein specified. If the earned premium thus computed is greater than the advance premium paid, the Assured shall immediately pay the additional amount to the Corporation; but if the earned premium thus computed is less, the Corporation will return to the Assured the unearned portion of the said advance premium paid; but in any event the Corporation shall retain the minimum premium stated in the Declarations.

The Employers' Liability Assurance Corporation, Limited,
OF LONDON, ENGLAND.

ELEVATOR ENDORSEMENT. (Form 2215.)

This Policy does not cover on account of injuries or death suffered by any person or persons, whomsoever, while in or entering upon or alighting from the car of any elevator or hoist, or by reason of the existence of the elevator well, shaft or hoistway thereof, or the appliances, attachments or appurtenances contained therein, or the machinery directly connected therewith, unless such elevator or hoist is specifically described in the Schedule of the Policy and a charge for same is included in the premium.

This Endorsement when countersigned by a duly authorized General Agent of the Corporation and attached to Policy No. ...07745.....issued to.....PORTLAND RAILWAY LIGHT & POWER COMPANY..... shall be valid and shall form part of said Policy.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

SAMUEL STEETON

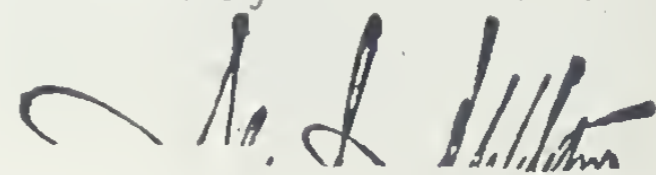
Manager and Attorney for the United States

Countersigned at...Portland, Oregon.....

this.....day of...April...23, 1929.....

by...JAMES McI. MOSE & CO.....

General Agent.



States.

Cancellation. **Condition B.** This Policy may be cancelled at any time by either of the parties upon five days' written notice to the other party, and the effective date of such cancellation shall then become the end of the Policy period. If such cancellation is at the Corporation's request, the Corporation shall be entitled to the earned premium computed pro rata. If such cancellation is at the Assured's request, the Corporation shall be entitled to a premium based upon the short rates for the time this Policy shall have been in force, determined by the Short Rate Cancellation Table printed hereon; but in any event the Corporation shall retain the minimum premium stated in the Declarations.

Notice of cancellation mailed to or delivered at the address of the Assured as given in the Declarations shall be sufficient notice. The check of the Corporation mailed to or delivered at such address shall be a sufficient tender of any unearned premium, but no tender shall be required if the premium has not been paid.

Inspection of Premises and Examination of Books. **Condition C.** The Corporation shall be permitted at all reasonable times to inspect the Assured's premises, elevators, elevator wells, shafts, hoistways, and all machinery, appliances and appurtenances connected with or contained in the same, and to examine the Assured's books and records at any time during the Policy period and within one year after the end of the Policy period for the purpose of determining the actual premium earned while this Policy was in force, and the Assured shall, whenever requested by the Corporation, furnish the Corporation with a written statement of the amount of remuneration earned by any of the persons referred to in Condition "A."

Notice. **Condition D.** Upon the occurrence of an accident covered by this Policy, the Assured shall give immediate written notice thereof to the Corporation or its duly authorized Agent. The Assured shall give like notice with full particulars of any claim made on account of any such accident. If any suit or other proceeding mentioned in Agreement III. is instituted against the Assured on account of any such accident, the Assured shall immediately forward to the Corporation or its duly authorized Agent every notice, summons, or other process served upon the Assured.

Co-operation. **Condition E.** The Assured, when requested by the Corporation, shall aid in effecting settlements, in securing evidence and the attendance of witnesses, in defending suits, and in prosecuting appeals, and shall at all times render to the Corporation all co-operation and assistance in the Assured's power. The Assured shall not voluntarily assume any liability, settle any claim or incur any expense, except at the Assured's own cost, or interfere in any negotiation for settlement or legal proceeding, without the consent of the Corporation previously given in writing, but the Assured may provide, at the expense of the Corporation, such immediate medical or surgical relief as shall be imperative at the time any such injuries are sustained.

Subrogation. **Condition F.** The Corporation shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law in the Assured and/or in any other person claiming hereunder, against persons, corporations, associations or estates, and the Assured shall execute all papers required and shall co-operate with the Corporation to secure its rights.

Other Insurance. **Condition G.** If the Assured has any other insurance applicable to a claim covered by this Policy, the Corporation shall not be obliged under this Policy to pay a larger proportion of or on account of any such claim than the limit of the Corporation's liability under this Policy, applicable to such claim, bears to the total corresponding limits of the whole amount of valid and collectible insurance.

Assignment. **Condition H.** No assignment of interest under this Policy shall bind the Corporation unless the consent of the Corporation shall be endorsed hereon. If the death, the insolvency, or the bankruptcy of the Assured shall occur during the Policy period, this Policy during the unexpired portion of such period shall cover the legal representatives of the Assured, provided notice shall be given to the Corporation in writing within thirty days after the date of such death, insolvency or bankruptcy.

Changes in Policy. **Condition I.** No Agreement or Condition of this Policy shall be waived or altered except by an endorsement attached hereto, signed by the Manager and Attorney of the Corporation for the United States; nor shall notice to any Agent, nor shall knowledge possessed by any Agent, or by any other person, be held to effect the waiver of, or a change in, any part of this Policy. Changes in the written portions of the Declarations made a part hereof may be made by an endorsement attached hereto, signed by the General Agent countersigning this Policy. Endorsements, when so signed and attached hereto, shall be construed as a part of this Policy.

Special Statutes. **Condition J.** If any of the Agreements, Conditions, or Declarations of this Policy are at variance with any specific statutory provision in force in the state within which coverage is granted, such specific statutory provision shall supersede any such Agreement, Condition, or Declaration of this Policy inconsistent therewith.

Acceptance. **Condition K.** The Assured by the acceptance of this Policy declares the several statements in the Declarations hereby made a part hereof to be true; and this Policy is issued upon such statements and in consideration of the premium as in this Policy provided.

In Witness Whereof, the Corporation has caused this Policy to be executed by its authorized Manager acting under power of Attorney, but this Policy shall not be in force unless countersigned by a duly authorized General Agent of the Corporation.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND.
By

Countersigned at Portland, Oregon
this 10 day of April, 1920
A. J. I. 20
General Agent.

SPECIAL COPY
[Signature]
Manager and Attorney for the United States.

*This space is intended for the attachment of such endorsements as may be executed as in this Policy provided, and when so executed and attached, they are to be construed as a part of this Policy.

This space is for the attachment of the Declarations as in this Policy provided, which, when attached as a part of this Policy.

Attended to and forming part of

Policy No. G. L. 27745

GENERAL LIABILITY FORM.

The Employers' Liability Assurance Corporation, Limited,
of London, England.

SAMUEL APPLETON, UNITED STATES MANAGER, BOSTON, MASS.

DECLARATIONS

- ITEM 1. Name of Assured, PORTLAND RAILWAY LIGHT & POWER COMPANY
P. O. Address, Electric Building, Portland, Oregon.
The Assured is A Corporation
(State whether individual, copartnership, corporation, receiver or trustee.)
- ITEM 2. The Policy period shall be from 12:01 o'clock A.M. APRIL 24th 1922,
to 12:01 o'clock A.M. APRIL 24th 1925, standard time, at the place
where this Policy has been countersigned.

ITEM 3. The Location of Insured Premises is (State Street, Number, Town and State of Each Building.)	The Premises are Occupied as (State the Purpose for which the Premises are used giving kind of Business if any.)	Estimated Floor Dimensions.	Number of Floors.	Estimated Street Frontage.	Estimated Remuneration of Employees.	Premium.
Electric Building at N.E. corner of Broadway and Alder Streets, including sidewalk surrounding same, Portland, Oregon	Office Building	100x100 Less 60x100	9 1	200	6000	Those en- gaged in the maintenance, care and up- keep of the building at .05 per hundred
Location of Buildings where Elevator is Situated (State Street and Number of Each Building.)	Number of Elevators.	Number of Landings.	Location in Building.	Kind of Elevators. (State whether Passenger, Freight, Sidewalk, One-story, Private House, Hand Hoist, Moving Platform or Escalator or Bomb Water, and whether Hy- draulic, Electric, Steam or Plunger.)		
as above	3	9	S.E. cor- ner	Passenger and Freight Electric - Otis Ele- vator		

Minimum Premium \$ 132.00 Total Premium (one year Period) \$ 506.00
When Policy Period is three years, the following computation shall apply:
Three year Period, Gross Premium \$ 506.00 () % discount for Period. Net Total Premium \$ 506.00
Payable (1) In Advance \$ (2) 1st Anniversary \$ (3) 2nd Anniversary \$

ITEM 4. The Corporation's limit of liability for one person receiving bodily injuries shall be SEVENTY FIVE HUNDRED AND 00/100 Dollars (\$ 2500.00), and, subject to the same limit for each person, the Corporation's total liability on account of any one accident causing bodily injuries to more than one person shall be FIFTEEN THOUSAND & 00/100 Dollars (\$ 15,000.00), and, in addition, the sums provided to be paid in Agreement I, sub-section (c) of this Policy.

ITEM 5. The interest of the Assured in the premises is Owner
(Owner, Lessee or Tenant.)

ITEM 6. The Assured manages the premises, except as follows: No exceptions

ITEM 7. The Assured occupies the premises, except as follows: No exceptions

ITEM 8. There is no elevator at any location designated, which is not disclosed above, except as follows: One sidewalk elevator and electric substation in basement, 1st and 2nd floors not covered

ITEM 9. The premises and all elevators have been accepted from the builders as satisfactory, except as follows: No exceptions

ITEM 10. Inspection reports and other notices and correspondence relating to inspection are to be mailed to the Assured at the address given above, or to the letter, etc. by request of the Assured, who acknowledges each person as the proper agent for the purpose.

ITEM 11. No Company has declined renewal of, or cancelled, insurance on this risk during the past three years, except as follows: No exceptions

2445A

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

DIRECTORS.

The Rt. Hon. Lord CLAUD HAMILTON, Chairman.
 ARTHUR DIOBY BESANT, Esq.
 Sir JOSEPH O. BROODBANK.
 Sir GORDON CAMPBELL, K.B.E.
 HUGH D. FLOWER, Esq.
 Sir RALPH C. FORSTER, Bart.
 Lt.-Col. Sir SAMUEL HOARE, Bart., C.M.G., M.P.
 W. H. MAUDSLAY, Esq.
 FRANCIS E. J. SMITH, Esq.
 Col. Sir EDWARD WARD, Bart., O.B.E., K.C.B., M.C.V.O.
 Sir PHILIP H. WATERLOW, Bart.

SECRETARY.

W. J. RALPH.

GENERAL MANAGER.

W. E. ORAY.

UNITED STATES BRANCH.

ADVISORY BOARD.

WILLIAM D. BALDWIN, Esq.
 (Chairman Otis Elevator Co.), New York.
 WM. ALLEN BUTLER, Esq.
 (Butler, Wychoff & Reid), New York.
 JOHN LOWELL, Esq., Boston.
 FRANK O. WEBSTER, Esq. (Kidder, Peabody & Co.), Boston.

EXECUTIVE COMMITTEE.

HENRY M. ROGERS, Esq. (Lawyer).
 JOHN S. THOMAS, Esq. (Real Estate).
 CHARLES FRANCIS ADAMS, Esq.
 (Treasurer Harvard College).
 CHARLES L. EDGAR, Esq.
 (President Edison Electric Illuminating Co.), Boston.

TRUSTEE.

THE NEW ENGLAND TRUST CO., Boston

SAMUEL APPLETON

Manager and Attorney for the United States
 BOSTON, MASS.

GENERAL LIABILITY POLICY

No. G. L. 27745

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND

UNITED STATES BRANCH

SAMUEL APPLETON,

Manager and Attorney for the United States,
 BOSTON, MASS.

Assured **POTLAND RAILWAY, LIGHT & POWER COMPANY.**

Address **POTLAND, CALIFORNIA**

Expires **APRIL 24th, 1925**

Premium, \$ **508.90**

JAMES McI. WOOD & CO.

GENERAL INSURANCE

Railway Exchange Bldg.

POTLAND - OREGON

SHORT RATE CANCELLATION TABLE

FOR A ONE YEAR POLICY

	Per cent. of Annual Premium		Per cent. of Annual Premium
1 day.....	2	80 days.....	28
2 days.....	4	85 ".....	29
3 ".....	6	90 ".....	30
4 ".....	8	95 ".....	31
5 ".....	10	100 ".....	32
6 ".....	12	105 ".....	33
7 ".....	14	110 ".....	34
8 ".....	16	115 ".....	35
9 ".....	18	120 ".....	36
10 ".....	20	125 ".....	37
11 ".....	22	130 ".....	38
12 ".....	24	135 ".....	39
13 ".....	26	140 ".....	40
14 ".....	28	145 ".....	41
15 ".....	30	150 ".....	42
16 ".....	32	155 ".....	43
17 ".....	34	160 ".....	44
18 ".....	36	165 ".....	45
19 ".....	38	170 ".....	46
20 ".....	40	175 ".....	47
21 ".....	42	180 ".....	48
22 ".....	44	185 ".....	49
23 ".....	46	190 ".....	50
24 ".....	48	195 ".....	51
25 ".....	50	200 ".....	52
26 ".....	52	205 ".....	53
27 ".....	54	210 ".....	54
28 ".....	56	215 ".....	55
29 ".....	58	220 ".....	56
30 ".....	60	225 ".....	57
31 ".....	62	230 ".....	58
32 ".....	64	235 ".....	59
33 ".....	66	240 ".....	60
34 ".....	68	245 ".....	61
35 ".....	70	250 ".....	62
36 ".....	72	255 ".....	63
37 ".....	74	260 ".....	64
38 ".....	76	265 ".....	65
39 ".....	78	270 ".....	66
40 ".....	80	275 ".....	67
41 ".....	82	280 ".....	68
42 ".....	84	285 ".....	69
43 ".....	86	290 ".....	70
44 ".....	88	295 ".....	71
45 ".....	90	300 ".....	72
		305 ".....	73
		310 ".....	74
		315 ".....	75
		320 ".....	76
		325 ".....	77
		330 ".....	78
		335 ".....	79
		340 ".....	80
		345 ".....	81
		350 ".....	82
		355 ".....	83
		360 ".....	84
		365 ".....	85
		370 ".....	86
		375 ".....	87
		380 ".....	88
		385 ".....	89
		390 ".....	90
		395 ".....	91
		400 ".....	92
		405 ".....	93
		410 ".....	94
		415 ".....	95
		420 ".....	96
		425 ".....	97
		430 ".....	98
		435 ".....	99
		440 ".....	100

FOR A THREE YEARS' POLICY

	Per cent. of 3 Years Premium		Per cent. of 3 Years Premium
1 month.....	10	16 months.....	72
2 months.....	17	17 ".....	73
3 ".....	20	18 ".....	74
4 ".....	23	19 ".....	75
5 ".....	26	20 ".....	76
6 ".....	29	21 ".....	77
7 ".....	32	22 ".....	78
8 ".....	35	23 ".....	79
9 ".....	38	24 ".....	80
10 ".....	41	25 ".....	81
11 ".....	44	26 ".....	82
12 ".....	47	27 ".....	83
13 ".....	50	28 ".....	84
14 ".....	53	29 ".....	85
15 ".....	56	30 ".....	86
16 ".....	59	31 ".....	87
17 ".....	62	32 ".....	88
18 ".....	65	33 ".....	89
		34 ".....	90
		35 ".....	91
		36 ".....	92
		37 ".....	93
		38 ".....	94
		39 ".....	95
		40 ".....	96
		41 ".....	97
		42 ".....	98
		43 ".....	99
		44 ".....	100

Con-
 party, and
 Cancellation.

AND AFTERWARDS, to wit, on the 27th day of October, 1924, there was duly filed in said court an opinion in words and figures as follows, to wit: [12]

OPINION.

October 27, 1924.

GRIFFITH, LEITER & ALLEN, for Plaintiff.

WILBUR, BECKETT & HOWELL and E. K. OPPENHEIMER, for Defendant.

WOLVERTON, District Judge.—This is an action, on liability insurance, for injuries sustained by an employee of plaintiff in the building and premises described and mentioned in the policy. The covering clause of the policy is as follows:

“Agreement IV. This Policy covers, except as provided in Agreement V., bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons while within or upon the premises described in the Declarations, or the premises or the ways adjacent thereto, or elsewhere, by reason of the occupation, the use, the maintenance, the ownership or the control of the said premises by the Assured as described in the Declarations, including the making of such repairs and ordinary alterations as are necessary to the care of the said premises and their maintenance in good condition.”

The injury sustained was not on account of any of the excepted causes enumerated in Agreement V.

It is further provided that, "The foregoing Agreements are subject to the following conditions": among which is Condition "A," which recites, so far as essential here: [13]

"The premium for this Policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the Assured, in which case, as to such coverage, the premium is based upon the entire remuneration * * * earned during the Policy period by all persons employed by the Assured in the said business operations as expressed in Item 3 of the Declarations."

Further provision is made by the same condition for adjusting the premium earned at the expiration of the policy period, and for payment or repayment, as the case may be, according as the earned premium may be greater or less than the advance premium paid.

Item 3 describes the premises as "Electric Building at N. E. corner of Broadway and Alder Streets, including sidewalk surrounding same." Such also is the building in which the elevators, three in number, are situated. Item 3 contains, under the caption "Estimated Remuneration of Employees," the numerals 6000, and on the margin, under the caption "Premium," the language, "Those en-

gaged in the maintenance, care and upkeep of the building at .05 per hundred.”

The injured party, although in the employ of plaintiff, was engaged as an electrician in its repair-shop, operated at a place distant about one mile from the building and premises described in the policy.

The contention of the defendant corporation, which is presented by its answer to the complaint and plaintiff's demurrer thereto, is that the injured party was not one of the persons covered by the policy; it being argued that only such employees of the plaintiff as were engaged in the maintenance, care and upkeep of the building described in Item 3 were so covered. This depends entirely upon the proper interpretation of the provisions of the policy. [14] There is no ambiguity which needs elucidation extrinsically as an aid to interpretation. The covering clause particularizes bodily injuries, etc., “sustained by any person or persons while within or upon the premises described in the Declarations.” The language is most comprehensive—“any person or persons.” That the injured party was within the premises described in the declarations when hurt is not questioned.

Condition A is intended wholly as a regulation for adjusting the premium to be paid for the issuance of the policy.

It is not doubted that the policy covers members of the general public, regardless of any employment by plaintiff. The premium for this is as expressed in Item 3. But the premium for cover-

age upon plaintiff's employees is based upon a different estimate, namely, the remuneration earned by all employees of plaintiff during the policy period, engaged in the business operations as expressed in such Item 3, that is to say, the maintenance, care and upkeep of the building designated, at .05 per hundred. While not all of plaintiff's employees were engaged in the maintenance, care and upkeep of the building, Condition A does not avail to vary or modify the engagement of Agreement IV, which specifies a coverage of bodily injuries sustained by any person or persons while within or upon the premises. This plainly and obviously covers, not only the general public, but employees of plaintiff as well, whether engaged at the time in the maintenance, care and upkeep of the building or not. It is reasonable to assume that the parties considered that .05 per hundred of the entire remuneration for the policy period, of those employees so [15] engaged was adequate as a premium for coverage upon all of plaintiff's employees, including those not so engaged. But, however that may be, Condition A treats of a different subject from that treated by Agreement V, the one relating to an adjustment of premium and the other to the persons or subjects covered by the policy of insurance. I find no ground for inference that, because the basis stipulated for ascertaining the premium which was to govern as to plaintiff's employees did not include all such employees, it was intended that none of such employees were to be embraced by the covering clause

except those engaged in the maintenance, care and upkeep of the building designated. The clauses themselves are separate and distinct, and treat of separate and distinct subjects, and must be so considered. Thus considered, the party injured, though an employee of plaintiff not engaged in the maintenance, care and upkeep of the building, was embraced by the covering clause of the policy.

Demurrer to the answer will be sustained. [16]

AND AFTERWARDS, to wit, on the 2d day of December, 1924, there was duly filed in said court an amended answer, in words and figures as follows, to wit: [17]

AMENDED ANSWER.

Comes now above-named defendant and for an amended answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Denies each and every allegation therein contained and the whole thereof unless herein specifically admitted.

II.

Admits the allegations contained in Paragraph I of plaintiff's complaint.

III.

Admits the allegations contained in Paragraph II of plaintiff's complaint.

IV.

Admits the allegations contained in Paragraph III of plaintiff's complaint.

V.

Denies each and every allegation contained in Paragraph IV of plaintiff's complaint except admits that plaintiff is the owner of the building known as the Electric Building located at the Northeast corner of Broadway and Alder Streets and that on or about April 29th, 1922, plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure plaintiff to the extent of \$7,500.00 [18] against damages and in addition against such expenses as might be incurred by plaintiff for such immediate surgical or medical relief at the time injury was sustained by such person or persons as were covered by said contract of insurance, and that Exhibit "A" attached to plaintiff's complaint is a substantial copy of said contract of insurance.

VI.

Denies each and every allegation contained in Paragraph V of plaintiff's complaint except admits that said contract of insurance has been at all times since April 29th, 1922, in full force and effect.

VII.

Denies each and every allegation contained in Paragraph VI of plaintiff's complaint except admits that the freight elevator upon which James A. Freeborough received certain injuries is one of the elevators included in Item 3 of the declara-

tions of said Exhibit "A" and is located in the Electric Building.

VIII.

Defendant has not sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained in Paragraph VII of plaintiff's complaint and therefore denies the same.

IX.

Denies each and every allegation contained in Paragraph VIII of plaintiff's complaint and the whole thereof.

X.

Denies each and every allegation contained in Paragraph IX of plaintiff's complaint but admits that plaintiff notified defendant that one James A. Freeborough had sustained certain injuries and that the defendant refused to assume any responsibility under said contract of insurance and denied any and all [19] liability on account of or growing out of said accident.

XI.

Defendant has not sufficient knowledge or information upon which to form a belief as to the falsity of the allegations contained in Paragraph X of plaintiff's complaint and therefore denies the same.

XII.

Denies each and every allegation contained in Paragraph II of plaintiff's complaint except admits that on or about the 17th day of February, 1924, James A. Freeborough filed suit against the

plaintiff in the Circuit Court of the State of Oregon for Multnomah County for the recovery of damages growing out of injuries resulting to him which he alleged was the result of negligence of plaintiff in the construction and operation of said elevator.

XIII.

Denies each and every allegation contained in Paragraph XII of plaintiff's complaint except admits that plaintiff delivered a complaint and summons to defendant requesting it to defend said action.

XIV.

Admits each and every allegation contained in Paragraph XIII of plaintiff's complaint.

XV.

Denies each and every allegation contained in Paragraph XIV of plaintiff's complaint and the whole thereof.

XVI.

Denies each and every allegation contained in Paragraph XV of plaintiff's complaint and the whole thereof. [20]

XVII.

Denies each and every allegation contained in Paragraph XVI of plaintiff's complaint except admits that defendant at all times refused to satisfy any judgment or to reimburse plaintiff by reason of any matter set forth in its complaint.

XVIII.

Defendant has no knowledge or information sufficient to form a belief as to the truth of falsity of

the allegations contained in Paragraph XVII of plaintiff's complaint and therefore denies the same.

XIX.

Denies each and every allegation contained in Paragraph XVIII of plaintiff's complaint and the whole thereof.

Defendant for a further separate answer and defense to plaintiff's complaint admits, denies, and alleges as follows:

I.

That plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon and that it has changed its corporate name from that of Portland Railway Light & Power Co. to that of Portland Electric Power Company.

II.

That the defendant is a corporation duly organized and existing and duly authorized to do a general insurance business within the State of Oregon.

III.

That on or about April 24, 1922, plaintiff and defendant entered into a contract for insurance and by reason of said agreement, defendant issued to plaintiff one of its policies of insurance bearing number G. L. 27745. [21]

IV.

That said policy of insurance covered and protected the plaintiff against claims resulting from liability imposed upon plaintiff by law resulting from injury accidentally sustained by one person to the extent of \$7,500.00 and the expenses incurred

by the plaintiff for such immediate medical and surgical relief as shall be imperative at the time any such injuries are sustained, provided, however, that said claim or expense was within the protection or provision of said policy.

V.

That that certain part of the Electric Building known as Electric Sub-Station was specifically excluded from protection by virtue of said policy by item 8 of said declarations.

VI.

That James A. Freeborough was employed by plaintiff to work in plaintiff's repair-shop which was operated at a place distant about one mile from the Electric Building and/or premises or places covered by said policy of insurance.

VII.

That said James A. Freeborough, in the course of his employment in said repair-shop went from said repair-shop to the Electric Sub-Station of the plaintiff in said Electric Building and was taking therefrom a piece of machinery from said Sub-station, which was to have been taken to plaintiff's repair-shop for repairs and that while transporting the same upon an elevator from said Electric Sub-Station and being one of the elevators referred to in Item 3 of the declarations, the said Freeborough received injuries to his right foot and as a result thereof, his right leg above the ankle was amputated. [22]

VIII.

That the coverage under said policy was based upon the premium paid.

IX.

That agreements 1, 2, 3, 4, 5, 6 and 7 of said policy of insurance were subject to conditions A to K, inclusive, as contained in said policy and the declarations or rider thereto.

X.

That condition "A," among other things, provides: "The premium for this policy is as expressed in Item 3 of the declarations except as this policy covers injuries and/or death to employees of the assured, in which case, as to the coverage, the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the assured in said business operations as expressed in Item 3 of the declarations."

XI.

That in Item 3 of declarations the estimated remuneration of employees was \$6,000.00.

XII.

That the employees engaged in the character of work in which the said James A. Freeborough was employed and especially the remuneration or salary paid or contemplated to be paid to said James A. Freeborough, was not included or intended to be included in said estimated remuneration of \$6,000.00 mentioned in Item 3 of declarations.

XIII.

That the only remuneration of employees esti-

mated in said Item 3 was the remuneration of those employees of plaintiff who were engaged in the maintenance, care and upkeep of the building mentioned in said policy. [23]

XIV.

That no premium was paid by plaintiff to defendant for the purpose of covering any employees of plaintiff other than those referred to and specified in Item 3, to wit: "Those engaged in the maintenance, care and upkeep of the building (Electric Building)" and that plaintiff paid to defendant for protection of these employees .05 per hundred based upon the estimated remuneration of said employees, to wit: \$6,000.00

XV.

That James A. Freeborough was not an employee of plaintiff engaged in the maintenance, care and upkeep of said building, to wit: Electric Building and/or premises mentioned in said policy.

XVI.

That it was intended by and between plaintiff and defendant that the endorsement on the declarations attached to the policy reading "those engaged in the maintenance, care and upkeep of the building at .05 per hundred" and condition "A" of said policy confined the insurance above referred to to such employees and to exclude all others especially James A. Freeborough.

XVII.

That the premium charged for said policy was

composed of two items, to wit: One of which was with respect to the liability of the insured to all persons save employees and the other with respect to liability of the insured to its employees specifically referred to in said declaration and only such employees. [24]

XVIII.

That no premium was charged with respect to any employee of plaintiff save "those engaged in the maintenance, care and upkeep of the building" referred to in said policy and said last-mentioned employees were the only employees of plaintiff intended by the parties to be covered by said policy of insurance.

XIX.

That plaintiff did not agree to pay nor was plaintiff obligated to pay any premium with respect to the remuneration of any of its employees other than the ones referred to in said Item 3 of declarations.

Defendant for a second and further answer and defense to plaintiff's complaint admits, denies and alleges as follows:

I.

That plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon and that it has changed its corporate name from that of Portland Railway Light & Power Co. to that of Portland Electric Company.

II.

That the defendant is a corporation duly organized and existing and duly authorized to do a general insurance business within the State of Oregon.

III.

That on or about April 24, 1922, plaintiff and defendant entered into a contract for insurance and by reason of said agreement, defendant issued to plaintiff one of its policies of insurance bearing number G. L. 27745. [25]

IV.

That said policy of insurance covered and protected the plaintiff against claims resulting from liability imposed upon plaintiff by law resulting from injury accidentally sustained by one person mentioned in said policy to the extent of \$7,500.00 and the expenses incurred by the plaintiff for such immediate medical and surgical relief as shall be imperative at the time any such injuries are sustained, provided, however, that a said claim or expense was within the protection or provisions of said policy.

V.

That that certain part of the Electric Building known as Electric Sub-station was specifically excluded from protection by virtue of said policy by Item 8 of said declarations.

VI.

That James A. Freeborough was employed by plaintiff to work in plaintiff's repair-shop which

was operated at a place distant about one mile from the Electric Building and/or premises or places covered by said policy of insurance.

VII.

That said James A. Freeborough, in the course of his employment in said repair-shop, went from said repair-shop to the Electric Sub-station of the plaintiff in said Electric Building and was taking therefrom a piece of machinery from said Sub-station, which was to have been taken to plaintiff's repair-shop for repairs and that while transporting the same upon an elevator from said Electric Sub-station and being one of the elevators referred to in Item 3 of the declarations, the said Freeborough received injuries to his right foot and as a result thereof, his right leg above the ankle was amputated. [26]

VIII.

That the coverage under said policy was based upon the premium paid.

IX.

That agreements 1, 2, 3, 4, 5, 6 and 7 of said policy of insurance were subject to conditions A to K, inclusive, as contained in said policy and the declarations or rider thereto.

X.

That condition "A," among other things, provides: "The premium for this policy is as expressed in Item 3 of the declarations except as this policy covers injuries and/or death to em-

ployees of the assured, in which case, as to the coverage, the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the assured in said business operations as expressed in Item 3 of the declarations.”

XI.

That in Item 3 of declarations the estimated remuneration of the employees was \$6,000.00.

XII.

That the employees engaged in the character of work in which the said James A. Freeborough was employed and especially the remuneration or salary paid or contemplated to be paid to said James A. Freeborough, was not included or intended to be included in said estimated remuneration of \$6,000.00 mentioned in Item 3 of declarations.

XIII.

That the only remuneration of employees estimated in said Item 3 was the remuneration of those employees of plaintiff who were engaged in the maintenance, care and upkeep of the building mentioned in said policy. [27]

XIV.

That James A. Freeborough was not an employee of plaintiff engaged in the maintenance, care and upkeep of said building, to wit: Electric Building and/or premises mentioned in said policy.

XV.

That no premium was charged with respect to any employee of the plaintiff save those engaged in the maintenance, care and upkeep of the building referred to in said policy.

XVI.

That plaintiff did not agree to pay nor was plaintiff obligated to pay any premium with respect to the remuneration of any of its employees other than the ones referred to in Item 3 of the declarations.

XVII.

That by the terms of said policy the only employees of the plaintiff whose injuries or deaths were covered were those specified in said policy, to wit: Those engaged in the maintenance, care and upkeep of the building referred to in said policy. That by reason of the said coverage with respect to said employees whose estimated remuneration was the sum of \$6,000.00 per annum, the plaintiff agreed to pay to defendant a premium at the rate of five cents per hundred dollars. That no premium was paid to defendant for coverage of injuries or death to any of plaintiff's other employees, all of whom were, including said Freeborough, as hereinabove set forth, excluded from the operation of said policy by the terms thereof.

Defendant for a third and further answer and defense to plaintiff's complaint, admits, denies and alleges as follows:

I.

That plaintiff is a corporation created and existing [28] under and by virtue of the laws of the State of Oregon and that it has changed its corporate name from that of Portland Railway Light & Power Co. to that of Portland Electric Company.

II.

That the defendant is a corporation duly organized and existing and duly authorized to do a general insurance business within the State of Oregon.

III.

That on or about April 24, 1922, plaintiff and defendant entered into a contract for insurance and by reason of said agreement, defendant issued to plaintiff one of its policies of insurance bearing number G. L. 27745.

IV.

That at all of the times mentioned in the complaint there was in full force and effect in the State of Oregon a Workmen's Compensation Act or Law which governed, prescribed and established the rights, duties and obligations of plaintiff and of the said Freeborough. That by the terms of the policy sued on it was stipulated and agreed by the parties thereto that said policy should not cover injuries to any employee of the plaintiff under any Workmen's Compensation Act or Law. That the said Freeborough, at the time of his alleged injury, was an employee of plaintiff under the said Workmen's Compensa-

tion Act or law of the State of Oregon. That by reason thereof injuries to him were not covered by the terms of said policy.

WHEREFORE this defendant prays that the plaintiff take nothing by the complaint herein and the defendant be given a judgment for costs and disbursements.

WILBUR, BECKETT & HOWELL,
Attorneys for Defendant. [29]

United States of America,
District of Oregon,
State of Oregon,
County of Multnomah,—ss.

I, James McL. Wood, being first duly sworn, say, I am the attorney-in-fact of the defendant in the above-entitled suit; that I have read the foregoing amended answer and know the contents thereof, and that the same is true of my own knowledge, except as to matters stated on information and belief, and as to such matters I believe the same to be true.

JAS. McL. WOOD.

Subscribed and sworn to before me this 1 day of December, 1924.

[Seal]

F. C. HOWELL,
Notary Public for Oregon.

Com. exp. 11/4/28.

Filed December 2, 1924. [30]

AND AFTERWARDS, to wit, on the 17th day of December, 1924, there was duly filed in said court a motion to strike out parts of amended answer, in words and figures as follows, to wit: [31]

MOTION TO STRIKE OUT PARTS OF AMENDED ANSWER.

Comes now the plaintiff and moves the Court for an order herein, striking the second and further answer and defense of the defendant of defendant's amended answer, for the reason that the defendant has attempted to set up more than one separate and distinct defense thereto, to wit, the additional defense shown in paragraph XVIII thereof, which, by amendment, has been added to the original second and further answer herein.

And in case the Court should grant said motion, then the plaintiff further moves the Court for an order, requiring the defendant, upon repleading the subject matter of said paragraph XVIII of said second further and separate answer, to plead the facts with reference to the acceptance or rejection [32] by the plaintiff of the benefits of the Workmen's Compensation Act of the State of Oregon.

And, further, if the Court should refuse the motion of plaintiff first above stated, then the plaintiff further moves the Court for an order herein, striking from said paragraph XVIII of

said second amended answer, the allegation, to wit, "That the said Freeborough, at the time of his alleged injury, was an employee of plaintiff under the said Workmen's Compensation Act or Law of the State of Oregon," for the reason that said allegation is a conclusion of law and is not supported by any facts which can be truthfully pleaded, and said allegation is therefore sham and frivolous.

GRIFFITH, PECK & COKE.
GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.

Filed December 17, 1924. [33]

AND AFTERWARDS, to wit, on Monday, the 29th day of December, 1924, the same being the 48th judicial day of the regular November term of said court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [34]

MINUTES OF COURT—DECEMBER 29, 1924
—ORDER RE MOTION TO STRIKE OUT
PARTS OF AMENDED ANSWER.

Now at this day this cause comes on to be heard by the Court on the motion to strike out parts of the amended answer on file herein, plaintiff appearing by Mr. Cassius M. Peck, of counsel, and

defendant by Mr. Ralph W. Wilbur and Mr. E. K. Oppenheimer, of counsel. And the Court having heard the arguments of counsel, and being advised in the premises,—

IT IS ORDERED that said motion be and the same is hereby sustained as to the first paragraph, and that defendant be and he is hereby allowed to amend by interlineation the amended answer herein. [35]

AND AFTERWARDS, to wit, on the 13th day of January, 1925, there was duly filed in said court a demurrer and reply to answer, in words and figures as follows, to wit: [36]

DEMURRER AND REPLY TO ANSWER.

Comes now the plaintiff and demurs to the first further and separate answer and defense and to the second further and separate answer and defense, each as set forth in defendant's answer herein, for the reason:

That the said further and separate answers and defenses, and each of them, fail to state facts sufficient to constitute a defense herein.

Replying to the third further and separate answer and defense, as set forth in defendant's answer, the plaintiff admits, denies and alleges:

I.

Admits the allegations of paragraphs I, II, and III thereof. [37]

II.

Replying to paragraph IV thereof, plaintiff admits that at all times mentioned in the complaint, there was in full force and effect in the State of Oregon a Workmen's Compensation Act or law; that by the terms of the policy herein sued upon, to wit, Exhibit "A" attached to the complaint, it is provided that said policy shall not cover injuries or death to any employee of the assured under any Workmen's Compensation Act or law. Denies that the said Freeborough, at the time of his alleged injury, was an employee of the plaintiff under the said Workmen's Compensation Act or law of the State of Oregon, for the reason that the plaintiff, under its former name of Portland Railway, Light and Power Company, did, on November 14, 1913, elect not to contribute to the Industrial Accident Fund created by said act and not to come within the purview of said act, all as shown by the following notice, which was given by the plaintiff, under its former name of Portland Railway, Light and Power Company, to the Industrial Accident Commission and which said notice has, at all times since the date thereof, continued in full force and effect:

"Portland, Oregon, November 14th, 1913.

To the State Industrial Accident Commission of the State of Oregon, Salem, Oregon.

Notice is hereby given you that the undersigned, a corporation organized under the laws of the State of Oregon, and qualified to transact business within the State of Oregon, and [38] being engaged in a business or occupation comprehended within the

scope and meaning of Chapter 112 of General Laws of Oregon for the year 1913, and filed in the office of the Secretary of State, February 25th, 1913, and approved by the people of the State of Oregon under the referendum on November 4th, 1913, elects not to contribute to the Industrial Accident Fund created by said act, and not to come within the purview of said act, but the undersigned hereby notifies you that it will not be obligated by said act or any provisions or provisions thereof.

PORTLAND RAILWAY, LIGHT AND
POWER COMPANY,

[Corporate Seal] By F. I. FULLER,
Vice-President.

Attest: C. N. HUGGINS,
Assistant Secretary.”

The said Freeborough on his part has never served any notice, or otherwise made any election to contribute to the Industrial Accident Fund created by said act, or to come within the purview of said act.

III.

Denies each and every other allegation contained in said third further and separate answer and defense, except as may have been hereinbefore expressly admitted, stated or qualified.

WHEREFORE, this plaintiff demands judgment as in its complaint prayed for.

GRIFFITH, PECK & COKE.

GRIFFITH, PECK & COKE,

Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, C. R. Peck, one of attorneys for plaintiff in the within entitled suit, do hereby certify that the foregoing demurrer is in my opinion well founded in law.

C. R. PECK.

Filed January 13, 1925. [39]

AND AFTERWARDS, to wit, on the 14th day of January, 1925, there was duly filed in said court a demurrer to reply, in words and figures as follows, to wit: [40]

DEMURRER TO REPLY.

Comes now the defendant and demurs to plaintiff's reply to defendant's third further separate answer and defense for the reason:

I.

That said reply fails to set forth facts sufficient to constitute a reply to defendant's third further separate answer and defense.

WILBUR, BECKETT, HOWELL &
OPPENHEIMER,

Attorneys for Defendant.

I, R. W. Wilbur, one of the attorneys for the defendant in the within entitled action, do hereby certify that the foregoing demurrer is in my opinion well founded in law.

R. W. WILBUR.

United States of America,
District of Oregon,—ss.

Due and timely service of the within demurrer and the receipt of a duly certified copy thereof, all at the city of Portland in the District of Oregon, is hereby admitted.

GRIFFITH, PECK & COKE,
M. C. C.,
Attorneys for Plaintiff.

Filed January 14, 1925. [41]

AND AFTERWARDS, to wit, on Monday, the 9th day of February, 1925, the same being the 83d judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [42]

MINUTES OF COURT—FEBRUARY 9, 1925—
ORDER OVERRULING DEMURRER TO
REPLY.

This cause was heard by the Court on the demurrer to the reply herein, and was argued by Mr. Cassius M. Peck, of counsel for plaintiff, and Mr. E. K. Oppenheimer, of counsel for defendant. Upon consideration whereof,—

IT IS ORDERED that said demurrer be and the same is hereby overruled. [43]

AND AFTERWARDS, to wit, on the 9th day of February, 1925, there was duly filed in said court an opinion, in words and figures as follows, to wit: [44]

OPINION.

February 9, 1925.

GRIFFITH, PECK & COKE, for Plaintiff.

WILBUR, BECKETT & HOWELL and E. K. OPPENHEIMER, for Defendant.

WOLVERTON, District Judge.—This case is here for the second time for interpretation of the policy upon which the action is based. It is now insisted by defendant, in support of its demurrer to plaintiff's reply, that, because of the following clause found in the policy, namely, "This policy shall not cover injuries or death * * * to any employee of the assured under any Workmen's Compensation Act or Law," it does not cover under the conditions present.

It is admitted that the Workmen's Compensation Act was rejected by plaintiff, and the reply declares that the employee Freeborough did not elect to come under its provisions.

The act, as I read it, so far as applicable, places employers primarily under its provisions, but they may escape its operation by rejecting the same in manner prescribed. The employees are not primar-

ily within its purview; nor does it affect them unless they elect to avail themselves of its provisions. When the [45] employer rejects the act and the employee does not elect to avail himself of its provisions, neither is henceforth under the act. So that the clause relied upon for relief from liability on the part of the defendant does not operate here as an exception to liability under the policy. The demurrer to the reply will therefore be overruled.

In view of the former opinion plaintiff's demurrer to the first and second further and separate answer and defense set up by the amended answer will be sustained.

Filed February 9, 1925. [46]

AND AFTERWARDS, to wit, on the 23d day of October, 1925, there was duly filed in said court a stipulation waiving jury, in words and figures as follows, to wit: [47]

STIPULATION WAIVING JURY TRIAL.

It is hereby stipulated between the parties hereto and their respective attorneys in open court that this law action may be tried before the Judge of the above-entitled court without a jury, and a jury is hereby waived.

Dated Oct. 23, 1925.

WILBUR, BECKETT & HOWELL &
OPPENHEIMER,

Attorneys for Defendant.

GRIFFITH, PECK & COKE,

Attorneys for Plaintiff.

Filed October 23, 1925. [48]

AND AFTERWARDS, to wit, on Friday, the 23d day of October, 1925, the same being the 95th judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [49]

MINUTES OF COURT—OCTOBER 23, 1925—
ORDER DIRECTING TRIAL OF CAUSE
WITHOUT JURY.

Based upon the stipulation herein filed by the respective parties and their attorneys,—

IT IS HEREBY ORDERED that this said law action be tried by the Judge of the above-entitled court without a jury and that the jury is hereby waived.

CHAS. E. WOLVERTON,
Judge.

Dated October 23, 1925.

Filed October 23, 1925. [50]

AND AFTERWARDS, to wit, on the 1st day of March, 1926, there was duly filed in said court an opinion, in words and figures as follows, to wit: [51]

OPINION.

March 1, 1926.

GRIFFITHS, PECK & COKE, for Plaintiff.

WILBUR, BECKETT, HOWELL & OPPENHEIMER, for Defendant.

WOLVERTON, District Judge.—After careful examination of the evidence and stipulations of counsel, and of their arguments and briefs, I am persuaded that the legal questions involved have heretofore been practically disposed of, and that the evidence serves to substantiate the plaintiff's cause of action.

Plaintiff has proffered its findings of fact and law, to which certain objections have been interposed. The objections will be denied, and the findings of fact and law, with the addition of two paragraphs, are approved and allowed. So will the judgment tendered be approved and signed. [52]

AND AFTERWARDS, to wit, on the 1st day of March, 1926, there was duly filed in said court findings of fact and conclusions of law, in words and figures as follows, to wit: [53]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

NOW after the hearing herein, wherein the parties appeared by their respective attorneys of record, testimony was introduced and arguments of counsel heard and delivered, and being fully advised in the premises, the Court makes the following

FINDINGS OF FACT.

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland, Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, and existing under the laws of Great Britain is a subject of Great [54] Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action ex-

ceeds Three Thousand Dollars (\$3,000.00), exclusive of costs and interest.

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance, attached to the complaint as Exhibit "A" whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred (\$7,500.00) Dollars against damages resulting from bodily injuries accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained.

V.

That said contract, except for the breaches of the defendant as hereinafter alleged, is now and has been at all times since April 29, 1922, in full force and effect and this plaintiff has complied with each and every condition thereof by it undertaken. [55]

VI.

That the freight elevator located in said Electric Building, and whereon and in connection with which bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item III of the declarations of said Exhibit "A."

VII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floor of said elevator and the side walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit "A" under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit "A," to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent of \$7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom. [56]

IX.

That immediately upon the happening of said accident, the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant re-

fused so to do and denied any and all liability on account of or growing out of said accident.

X.

That upon the happening of said accident the plaintiff incurred ambulance and hospital expenses for the imperative, immediate, medical and surgical relief of the said James A. Freeborough, in the aggregate sum of One Hundred Sixty-nine Dollars and Seventy-five cents (\$169.75); that it was imperative that surgical and medical service should be rendered to the plaintiff and such medical and surgical services, of the reasonable value of Two Hundred and Fifty Dollars (\$250.00) were rendered, by the chief surgeon of the plaintiff to the said James A. Freeborough, that the said chief surgeon of the plaintiff was employed by the plaintiff at an annual salary or retainer, to render surgical and medical aid to the employees of the plaintiff and under said contract and annual retainer the said medical and surgical services were rendered to the said James A. Freeborough without additional cost to the plaintiff.

XI.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his [57] said injuries, resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19, 1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XII.

That immediately thereafter, on February 19, 1924, this plaintiff delivered said complaint and summons to the defendant and requested it to defend said suit in accordance with the terms and provisions of said Exhibit "A."

XIII.

That thereafter, on February 23, 1924, this defendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIV.

That the allegations of said complaint charging the negligence of this plaintiff as the proximate cause of his injuries were true, and the sum of \$8,000.00 was a fair and reasonable compensation for the injuries and damages resulting to said James A. Freeborough from and on account of said accident.

XV.

That thereafter, acting in the best interest of both the plaintiff and defendant herein, this plaintiff as defendant in said suit, filed in said court and cause its confession, whereby it confessed judgment in the sum of \$8,000.00 and thereafter on June —, 1924, a judgment [58] in the sum of \$8,000.00 was duly entered in said cause in favor of said James A. Freeborough and against this plaintiff as defendant therein.

XVI.

That immediately thereafter this plaintiff demanded of the defendant that it satisfy said judg-

ment to the extent of \$7,500.00 and that it reimburse this plaintiff for said expense of \$500.00, incurred by the plaintiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its denial of any and all liability arising or growing out of said accident.

XVII.

That upon the refusal of the defendant to settle and satisfy said judgment to the extent of \$7,500.00 this plaintiff did on July 10th, 1924, in the necessary protection of its property from sale upon execution settle and pay said judgment by the payment to the said James A. Freeborough of \$7,500.00 in cash and by the delivery to him of an order for future surgical and medical service by the surgical and medical staff of this plaintiff.

XVIII.

That in so denying liability under said Exhibit "A" and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of \$7,500.00, as provided by said Exhibit "A," and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of \$7,500.00, as provided in said Exhibit "A," and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen

Dollars and Seventy-five Cents (\$419.75), this defendant has breached its said contract of Insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of [59] surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75), or any part thereof.

XIX.

That Freeborough was not at the time of injury an employee of plaintiff or otherwise under or subject to the Workmen's Compensation Act or Law of the State of Oregon.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit "A," under Agreement IV thereof and was not a person excluded by the terms of agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit "A," to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and to pay the expense incurred

by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, to wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents (\$419.75), and to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident [60] alleged in the complaint and covered by the said policy of insurance.

II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of said James A. Freeborough, to wit, in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents (\$419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00), violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75).

III.

That the plaintiff should recover judgment of and from the defendant in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-

five Cents (\$7,919.75), together with its costs and disbursements herein.

CHAS. E. WOLVERTON,
Judge.

Filed March 1, 1926. [61]

AND AFTERWARDS, to wit, on Monday, the 1st day of March, 1926, the same being the 1st judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause to wit: [62]

[Title of Court and Cause.]

JUDGMENT ORDER.

Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75), together with its costs and disbursements hereinafter to be taxed.

CHARLES E. WOLVERTON,
Judge.

Filed March 1, 1926. [63]

AND AFTERWARDS, to wit, on the 2d day of April, 1926, there was duly filed in said court, a cost bill, in words and figures as follows, to wit:
[64]

COST BILL.

The following is a statement of disbursements claimed by the plaintiff in the above-entitled cause:

Clerk's fees, taxed at	\$ 8.10
Prevailing fee	20.00
M. A. Fleming, reporting testimony	5.00
Witness Fees:	

James A. Freeborough—one day—2 miles..	2.10
--	------

Total.....\$35.20

Taxed April 3, 1926.

G. H. MARSH,
Clerk.

By H. S. Kenyon,
Deputy.

State of Oregon,
County of Multnomah,—ss.

I, Cassius R. Peck, being first duly sworn, say: That I am one of the attorneys for the plaintiff in the above-entitled cause; that the disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that plaintiff is entitled to recover the same.

CASSIUS R. PECK.

Subscribed and sworn to before me this 1st day of April, 1926.

[Seal]

EARL S. NELSON,
Notary Public for Oregon.

My commission expires Nov. 7, 1928.

Filed April 2, 1926. [65]

AND AFTERWARDS, to wit, on the 6th day of April, 1926, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [66]

PETITION FOR WRIT OF ERROR.

To the Honorable CHARLES E. WOLVERTON,
Judge of the Above-entitled Court:

Now, comes the defendant, The Employers' Liability Assurance Corporation Limited of London, England, and respectfully shows that on the first day of March, 1926, a judgment was rendered against your petitioner and in favor of the plaintiff above named in the sum of Seven Thousand Nine Hundred and 75/100 Dollars (\$7,919.75) and for costs and disbursements in favor of the plaintiff and against the defendant taxed at the sum of \$35.20 *Dollars.*

Your petitioner feeling itself aggrieved by the judgment order entered upon findings of fact and conclusions of law entered herein, herewith petitions this Court for an order allowing the defendant to prosecute a writ of error to the United States Circuit

Court of Appeals for the Ninth Circuit from the District Court of the United States for the District of Oregon, under and according to the laws of the United States in such cases made and provided and within the time allowed by law and also for an order that a transcript of the record and proceedings and all papers [67] upon which said judgment and rulings therein were rendered be duly authenticated as by law provided and sent to the United States Circuit Court of Appeals for the Ninth Circuit as aforesaid and also that an order be made fixing the amount of security which the said petitioner shall give and furnish upon said writ of error and that upon giving the said security or fund that proceedings in this case be suspended and stayed until the determination of said writ of error.

And your petitioner will ever pray.

That there is filed herewith in this court assignments of error relied upon by the said defendant.

WILBUR, BECKETT, HOWELL & OP-
PENHEIMER,

Attorneys for Petitioner.

State of Oregon,
County of Multnomah,—ss.

I, James McI. Wood, being first duly sworn, depose and say that I am the attorney in fact for the State of Oregon for the defendant petitioner and that the foregoing facts are true as I verily believe.

JAMES McI. WOOD.

Subscribed and sworn to before me this 30 day of March, 1926.

[Seal]

R. W. WILBUR,
Notary Public for Oregon.

My commission expires 9/27/28.

Filed April 6, 1926. [68]

AND AFTERWARDS, to wit, on the 6th day of April, 1926, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [69]

ASSIGNMENTS OF ERROR.

Now comes the defendant, The Employers' Liability Assurance Corporation Limited of London, England, and files with its petition for writ of error herein the following assignments of error upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

I.

That the Court erred in sustaining the motion of the plaintiff to strike parts of the amended answer of the defendants, to wit: Paragraph eighteen of the said amended answer as shown on page eleven thereof, marked paragraph seventeen as amended, for the reason that the same stated a good defense to the complaint of the plaintiff.

II.

That the Court erred in the overruling of the demurrer filed by the defendant to the plaintiff's reply made to the defendant's third, further and

separate answer and defense, which demurrer was for the reason that the said reply failed to set forth facts sufficient to constitute a reply to the defendant's third, further and separate answer. [70]

The plaintiff and defendant each submitted to the Court findings of fact, conclusions of law and judgment order, and each filed exceptions and objections to the findings of fact, conclusions of law and judgment order presented by the other party, and that the Court finally signed findings of fact and conclusions of law, and caused to be entered a judgment order as set forth herein in this transcript (bill of exceptions, page 14), and this defendant assigns the following errors:

III.

That the Court erred in making the following finding of fact, which is Number VIII in the findings of fact finally found by the Court:

“VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit ‘A’ under Agreement IV thereof and was not a person excluded by the terms of agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit ‘A,’ to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expenses incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent

of \$7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom”;

for the reason that the same was not justified by the evidence or admissions produced at the trial.

IV.

That the Court committed error in making the finding of fact as set forth in Paragraph XVIII, as follows:

“XVIII.

That in so denying liability under said Exhibit ‘A’ and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of \$7,500.00, as provided by said Exhibit ‘A,’ and in refusing to defend said suit and in refusing [71] to pay and satisfy said judgment to the extent of \$7,500.00, as provided in said Exhibit ‘A,’ and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen Dollars and Seventy-five Cents (\$419.75), this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said ex-

pense of surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75), or any part thereof.”

in that the evidence introduced in this action and the law applicable thereto did not justify the said finding.

V.

That the Court committed an error in making the finding of fact as set forth in Paragraph XIX, as follows:

“XIX.

That Freeborough was not at the time of injury an employee of plaintiff, or otherwise under or subject to the Workmen’s Compensation Act or Law of the State of Oregon.”

for the reason that the same was not justified by the law nor by any evidence introduced at this trial.

VI.

That the Court erred in making conclusions of law as follows, to wit, in Conclusion of Law No. 1:

“1. That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit ‘A,’ under Agreement IV thereof and was not

a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit 'A,' to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. [72] Freeborough, to wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents (\$419.75), and to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident alleged in the complaint and covered by the said policy of insurance,"

for the reason that the said conclusion of law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VII.

That the Court erred in making conclusions of law as follows, to wit, in Conclusion of Law No. 2:

"II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the im-

perative, immediate, medical and surgical relief of said James A. Freeborough, to wit, in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents (\$419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00), violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75),”

for the reason that the said conclusion of law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VIII.

That the Court erred in making conclusion of law as follows, to wit, in Conclusion of Law No. 3:

“III.

That the plaintiff should recover judgment of and from the defendant in the sum of SEVEN THOUSAND NINE HUNDRED AND NINETEEN DOLLARS AND SEVENTY-FIVE CENTS (\$7,919.75) together with its costs and disbursements herein,” [73]

for the reason that the said conclusion of law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

IX.

That the Court erred in giving a judgment or-

der in favor of the said plaintiff, which was in words and figures as follows:

“Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75) together with its costs and disbursements hereinafter to be taxed.”

WHEREFORE this defendant prays that the judgment of the District Court of the United States, for the District of Oregon, may be reversed.

WILBER, BECKETT, HOWELL & OP-
PENHEIMER,

Attorneys for Defendant.

Filed April 6, 1926. [74]

AND AFTERWARDS, to wit, on Tuesday, the 6th day of April, 1926, the same being the 32d judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [75]

MINUTES OF COURT—APRIL 6, 1926—OR-
DER ALLOWING WRIT OF ERROR.

On this 5th day of April, 1926, came the defendant, The Employers Liability Assurance Corporation Limited of London, England, a corporation,

by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error and the assignments of error to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does hereby allow the writ of error upon said defendant giving bond according to law in the sum of Eighty-five Hundred Dollars, which shall operate as a super-sedeas bond.

CHAS. E. WOLVERTON,
District Judge.

Dated April 6th, 1926.

Filed April 6, 1926. [76]

AND AFTERWARDS, to wit, on the 6th day of April, 1926, there was duly filed in said court, a bond on writ of error, in words and figures as follows, to wit: [77]

APPEAL BOND ON WRIT OF ERROR AND
SUPERSEDEAS.

KNOW ALL MEN BY THESE PRESENTS, That we, The Employers Liability Assurance Corporation Limited of London, England, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are firmly

bound unto the above-named plaintiff in the sum of \$8,500.00 Dollars to be paid to the said plaintiff for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of April, in the year of our Lord one thousand nine hundred and twenty-six.

WHEREAS, lately, at a regular term of the District Court of the United States for the District of Oregon, in a suit pending in said court between said Portland Electric Power Company, a corporation, and The Employers Liability Assurance Corporation Limited of London, England, a corporation, defendant, a judgment was rendered against the said defendant in the sum of Seven Thousand Nine Hundred Nineteen and 75/100 Dollars (\$7,919.75), plus costs amounting to and taxed in the sum of \$35.20 Dollars [78] and said defendant having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment of the said Court in the aforesaid suit and a citation directed to the said Portland Electric Power Company, a corporation, citing it to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in San Francisco and State of California, according to law, within thirty days from the date thereof,—

NOW, THEREFORE, THE CONDITION of the above obligation is such that if the Employers

Liability Assurance Corporation Limited of London, England, shall prosecute its writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said principal, The Employers Liability Assurance Corporation Limited of London, England, and American Surety Company of New York, as surety, have caused their corporate names and seals to be hereunto signed and affixed this 6th day of April, 1926.

THE EMPLOYERS LIABILITY ASSUR-
ANCE CORPORATION LIMITED OF
LONDON, ENGLAND,

By JAMES McI. WOOD,

Its Attorney-in-Fact.

AMERICAN SURETY COMPANY OF
NEW YORK,

[Seal American Surety Company]

By W. A. KING,

Resident Vice-President.

By H. DeFRANCO,

Resident Asst. Secretary.

By W. A. KING,

Resident Agent.

The foregoing bond is hereby approved by me this 6th day of April, 1926.

CHAS. E. WOLVERTON,

District Judge for the United States for the Dis-
trict of Oregon.

Filed April 6, 1926. [79]

AND AFTERWARDS, to wit, on the 8th day of April, 1926, there was duly filed in said court a stipulation for hearing on writ of error during the October term of the court of appeals, in words and figures as follows, to wit: [80]

STIPULATION RE HEARING ON WRIT OF ERROR AT OCTOBER SESSION OF COURT OF APPEALS.

IT IS HEREBY STIPULATED between the parties hereto that this case may be docketed and tried in San Francisco, California, during the October Term of 1926.

GRIFFITH, PECK & COKE,
By CASSIUS R. PECK,
Attorneys for Plaintiff.

WILBUR, BECKETT, HOWELL & OP-
PENHEIMER,
Attorneys for Defendant.

Filed April 8, 1926. [81]

AND AFTERWARDS, to wit, on the 12th day of April, 1926, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [82]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please include in the record for the Circuit Court of Appeals for the Ninth Circuit in the proceed-

ings in error in the above-entitled cause the following, to wit:

1. Complaint.
2. Amended answer.
3. Motion to strike second and further defendant's answer.
4. Order of December 29th, 1924, sustaining the said motion.
5. Demurrer and reply.
6. Demurrer of defendant to plaintiff's reply to defendant's third further and separate answer.
7. Order overruling demurrer to reply.
8. Stipulation waiving jury.
9. Order to try case without a jury.
10. Judgment order.
11. Cost bill.
12. Amended bill of exceptions.
13. Petition for writ of error.
14. Assignments of error. [83]
15. Order allowing writ of error.
16. Appeal bond on writ of error and superseas.
17. Writ of error.
18. Citation.
19. Stipulation to try case in San Francisco during the October Term of 1926 and to have case docketed for October Term of 1926.
20. All opinions by trial court.
21. All orders extending time for bill of exceptions.
22. All orders for extending time for docketing action in the Court of Appeals.

23. This praecipe.
24. Clerk's return to writ.
25. Clerk's certificate.

WILBUR, BECKETT, HOWELL & OP-
PENHEIMER,

Attorneys for Defendant Appellant.

IT IS HEREBY STIPULATED AND AGREED between the parties in the above-entitled action through their respective counsel that the foregoing praecipe contains a request for all portions of the record in any way material to the consideration of said cause in the United States Circuit Court of Appeals for the Ninth District in reviewing the same.

GRIFFITH, PECK & COKE,

Attorneys for Plaintiff.

WILBUR, BECKETT, HOWELL & OP-
PENHEIMER,

Attorneys for Defendant.

Filed April 12, 1926. [84]

AND AFTERWARDS, to wit, on the 12th day of April, 1926, there was duly filed in said court a bill of exceptions in words and figures as follows, to wit: [85]

AMENDED BILL OF EXCEPTIONS.

BE IT REMEMBERED, That heretofore, to wit, on the 23d day of October, 1925, at Portland, Oregon, in the District Court of the United States for the District of Oregon, the above-entitled cause

came on for trial and was heard before the Honorable Chas. E. Wolverton, Judge of the above-entitled court, presiding, the plaintiff appearing by Cassius Peck and the defendant appearing by R. W. Wilbur.

It was stipulated between the parties that a jury would be waived and that the case might be tried before the Court, and an order was entered upon said stipulation.

Thereupon the plaintiff produced evidence as follows:

That the plaintiff is a corporation organized under the laws of the State of Oregon, and that since the execution of the contract pleaded in the complaint it had changed its name from Portland Railway, Light & Power Company to that of Portland Electric Power Company; that the defendant is a corporation chartered, organized and existing under the laws of Great Britain and subject to the laws thereof, and is a citizen [86] doing business within the State of Oregon and has complied with the laws of the State of Oregon relative to foreign corporations. That the amount in controversy in this action exceeds the sum of three thousand dollars, exclusive of interest and costs. That the plaintiff is the owner of a building in Portland known as the Electric Building, located at the northeast corner of Broadway and Alder Streets, and that on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure the plaintiff to the extent of seventy-five hundred dollars against

damages, in accordance with a certain contract of insurance or insurance policy, a copy of which is attached to the said complaint herein and marked Exhibit "A," which insurance contract and policy was in force at all times from April 29, 1922, up to and including the time of the injury to one James A. Freeborough as alleged in the complaint.

That there was a freight elevator located in said Electric Building upon which the said James A. Freeborough was injured on the 4th day of April, 1923, and while the said Freeborough was riding upon said elevator, at which time his right foot was crushed between the floor of said elevator and the side walls of the elevator shaft, and that it was necessary to amputate said Freeborough's right leg above the ankle. That upon the happening of said accident the said plaintiff notified the defendant and requested the defendant to investigate and settle for the claims resulting from said accident, in accordance with the provisions of the insurance policy as set forth in said Exhibit "A" attached to the complaint, but that the defendant refused to so do and denied any and all liability growing out of the said accident. [87]

That upon the happening of said accident to Freeborough the plaintiff immediately called an ambulance and took the said Freeborough to the St. Vincent's Hospital at Portland, Oregon, where the injured was given medical and surgical treatment, and the leg of the said Freeborough was amputated above the ankle; that the ambulance and hospital expenses incurred by the said plaintiff in

said medical and surgical relief to the said Freeborough were in the sum of \$169.75, and that the surgeon who performed the said work was the surgeon of the plaintiff and in the employ of the plaintiff upon an annual retainer to administer surgical and medical relief to the employees of the plaintiff; but that the said plaintiff did not pay the said surgeon any additional sum for surgical and medical relief administered to the said Freeborough, but the said surgical and medical relief was administered by said surgeon in performance of his annual retainer contract with the plaintiff, but that the reasonable value of said services so rendered by said surgeon to said Freeborough was the sum of \$250.00.

That thereafter, and on February 17, 1924, the said Freeborough filed a suit against this plaintiff in the Circuit Court of the State of Oregon for the County of Multnomah for the recovery of damages growing out of his said injury as the proximate result of the negligence of the plaintiff in the construction and operation of said elevator, and that thereafter, on February 19, 1924, said complaint, together with a summons, was regularly served upon this plaintiff, and that thereafter, on February 19, 1924, the plaintiff delivered said complaint and summons to the defendant and requested the defendant to defend said suit in accordance with the terms and provisions of said insurance contract, and that thereafter, on February [88] 23, 1924, the defendant returned said complaint and summons to the defendant and denied any liability growing

out of said accident. That thereafter a judgment was entered against this plaintiff in favor of the said Freeborough for the sum of eight thousand dollars, said judgment having been confessed by this plaintiff, and said judgment was duly entered in the records of said Court.

That immediately thereafter this plaintiff demanded that this said defendant pay the said judgment to the extent of seven thousand five hundred dollars and reimburse the plaintiff for the expense of five hundred dollars incurred by it for imperative surgical relief to the said Freeborough, but that the defendant refused to so satisfy the said judgment or to reimburse this plaintiff, and reiterated its denial of any liability arising or growing out of said contract. That upon the refusal of this defendant to settle and satisfy said judgment to the extent of seventy-five hundred dollars this plaintiff did, on July 10, 1924, in the necessary protection of its property from sale upon execution, settle and pay such judgment by payment to the said Freeborough of seventy-five hundred dollars in cash and by delivering to him an order for future surgical and medical services by the surgical and medical staff of the plaintiff.

There was then offered in evidence in this case a certain exhibit marked Plaintiff's Exhibit No. 1, as follows: [89]

PLAINTIFF'S EXHIBIT No. 1.

(Title of Court and Cause.)

“IT IS HEREBY STIPULATED AND AGREED, by and between the parties thereto as follows:

I.

That the facts alleged in paragraphs I, II, III, IV, V, VI, IX, XI, XII, XIII, XVI and XVII of the complaint herein, are true, except as to paragraph five (5) defendant specifically denies any breach or breaches of said contract of insurance.

II.

With reference to the allegations of Paragraph X of said complaint, it is stipulated that upon the happening of said accident to the said Freeborough, the plaintiff immediately called an ambulance and took the said Freeborough to St. Vincent's Hospital, in the City of Portland, Oregon, where the surgeon of the plaintiff administered such medical and surgical relief, including the amputation of the limb of the said Freeborough, as the condition of said Freeborough immediately demanded; that the ambulance and hospital expense incurred and paid by the plaintiff in said medical and surgical relief to the said Freeborough, was in the aggregate sum of One Hundred Sixty-nine Dollars and Seventy-five Cents (\$169.75); that the surgeon of the plaintiff is employed by the plaintiff on an annual retainer, to administer surgical and medical relief to the employees of the plaintiff, and the plaintiff

did not pay said surgeon any additional sum for surgical and medical relief administered to said Freeborough, but the said surgical and medical relief was administered to the said Freeborough by said surgeon in the performance of this annual retainer contract with the plaintiff; that the reasonable value of the services rendered to the said Freeborough by said chief surgeon of the plaintiff, was in the aggregate sum of Two Hundred and Fifty (\$250.00) Dollars.

III.

That the plaintiff, before commencing its action herein, demanded payment of the defendant in the amount demanded in the complaint, and the defendant refused to pay said amount, or any part thereof.

IV.

That the said Freeborough was employed by the plaintiff at the time of the accident and his principal place of employment was in a machine-shop of the plaintiff; located at some distance from the said Electric Building, in which machine-shop power driven machinery was used; that the said Freeborough was not engaged in the maintenance, care and upkeep of the said Electric Building nor was the salary of the said Freeborough included in the estimated remuneration of the employees, [90] of \$6,000.00, referred to in Item Three of the Declarations attached to the Contract of Insurance, attached to and made a part of the complaint.

V.

That this stipulation may be introduced in evi-

dence by either party upon the trial of this cause and shall be proof of each and every fact herein stipulated.

Dated at Portland, Oregon, this 20th day of October, 1925.

GRIFFITH, PECK & COKE,
Attorneys for Plaintiff.

WILBUR, BECKETT, HOWELL & OP-
PENHEIMER,

Attorneys for Defendant.
By R. W. WILBUR."

Thereupon JAMES ARTHUR FREEBOROUGH was produced as a witness for the said plaintiff, and testified as follows:

TESTIMONY OF JAMES ARTHUR FREEBOROUGH, FOR PLAINTIFF.

My name is James Arthur Freeborough, thirty-seven years of age, and my training is along mechanical lines, with machine work, electric work, designing and drafting and I have followed that occupation since I was sixteen. That at the times of this accident I was employed by the Portland Electric Power Company in the capacity of electrical machinist and made mechanical repairs to the machinery of the plaintiff whenever I was called in the City of Portland, subject to the direction of my superiors. That my headquarters were at the Hawthorne Building, at East Water and Hawthorne Avenue, which is the shop where I worked, but on the day of my accident I went to the Electric Building, in Portland, Oregon. I was

(Testimony of James Arthur Freeborough.)

sent there to repair an air-compressor which is used in the service of the building, to take out the electric motor and repair a burned bearing, and was to take the damaged parts over to the Hawthorne Building and repair them. We had loaded these parts [91] on the elevator, that is the parts that had been damaged, and the elevator was a small cage with little room for the parts; and one of the parts I thought was a little close to the edge and I reached over to remove it. It looked as though it was just on a balance and I moved it to make it more secure and stepped back slightly and my foot came over the edge of the elevator just at the time it was coming up to an I beam supporting the first floor. I must have stepped back with my foot so that the heel projected over the edge of the elevator slightly. There was only about an inch of space between the I beam and the edge of the platform and that caught my heel and twisted it back. Two sides of the elevator were entirely open, or unenclosed, and there was nothing whatever to prevent the elevator being entirely enclosed, and if the elevator had been enclosed it would have been impossible for me to have been hurt. After the accident they sent for the ambulance and carried me to the hospital, operated I think about an hour after the accident, which operation consisted of the amputation of my leg a few inches below the knee to remove the portions of my leg that were mangled. They made a second amputation at the same time to be more sure that there was nothing further that

(Testimony of James Arthur Freeborough.)

was bruised or any more mangled parts. I was at the hospital about a month and had a special nurse. Dr. Sommer performed the operation and there was an assistant. Dr. Sommer is the Chief Surgeon of the Portland Power Company, plaintiff, and all of the medical and surgical assistance was rendered from his office, with one slight exception.

That subsequently I filed a suit against the Portland Electric Power Company.

A copy of said complaint was shown to the said witness and identified by him as the complaint that he filed [92] against this plaintiff, which generally charged this plaintiff with negligence in the operation and maintenance of its said elevator and that on account of the negligence of this plaintiff, without the negligence of the said Freeborough, the said Freeborough received the injury complained of.

Said witness further testified: I was receiving wages at the time of the accident of approximately \$200.00 a month and had been earning that sum for a long time and had been in the employ of this plaintiff for about one year. That I have taken an engineering course in Boston and a home course of study for about three years, and have attended Y. M. C. A. night schools and have had about fifteen years practical experience. That I demanded in my suit damages to the extent of twenty-five thousand dollars, and I would not accept forty-five hundred dollars offered by the claim agent of this plaintiff and therefore brought suit. That there was no collusion or agreement of any kind between the offi-

cers of this plaintiff and myself with reference to the settlement of the suit, but that I would not be willing at any time to accept a sum less than eight thousand dollars for my injury. My attorney desired to settle for a little less money, but I would not settle for less than the said eight thousand dollars. That there had been paid upon said judgment only the sum of seventy-five hundred dollars, and that there was given a written statement by this plaintiff to me that I could have medical service as long as it was necessary, without charge, by the Chief Surgeon of this plaintiff. That the Chief Surgeon of this plaintiff gave me a written order for a mechanical foot and things of that kind so long as it might be necessary, and that they paid one hundred and fifty dollars for an artificial limb. That [93] there was given an order for five hundred dollars, together with the seventy-five hundred dollars, to make up the full amount of the eight thousand dollar judgment, the five hundred dollars being the agreed value of the service to be performed by this plaintiff.

I never served any notice upon the State Industrial Accident Commission of Oregon of my desire to come under the Workmen's Compensation Law of the State of Oregon, and have never held any communication with anyone about the Workmen's Compensation Law of the State of Oregon, nor made any effort to come under the said Act.

Cross-examination.

My headquarters were at the machine-shop on the east side of the river, in Portland, Oregon, at

East Water and Hawthorne Avenue, and I worked there as machinist and repair work and the greater portion of my time was spent at said place, and in the said building there was considerable power driven machinery, consisting of lathes and usual machine-shop equipment and electrical appliances. That the accident happened in the Electric Building, in Portland, Oregon, which was on the other side of the Willamette River from the place where I generally worked, but this said plaintiff owned both said buildings. That in the settlement of the said judgment which was confessed against this plaintiff and in favor of me there was paid to my attorney the sum of seventy-five hundred dollars, but the balance of five hundred dollars was not paid in cash, but it was understood and agreed that if I required any future medical service this was to be given to me by this plaintiff without charge, and that this was the basis [94] or substance of the agreement between the parties.

It was stated that Freeborough was not engaged in the maintenance, upkeep or care of the Electric Building, and that the salary of the said Freeborough was not in any sense included within the Six Thousand Dollar compensation specified in the policy of insurance, but that, generally speaking, Freeborough worked on the other side of the river from the Electric Building and did the repair work all over the city.

Redirect Examination.

The Electric Building had nine floors, and all of the floors in said Electric Building were occupied

(Testimony of James Arthur Freeborough.)

by the Portland Electric Power Company except one; that is the seventh floor, occupied by the General Electric Company, and that this plaintiff had employees about the City, outside of those engaged in the Electric Building, of probably nearly two thousand, and that a great many of said employees had business at the headquarters of this plaintiff in the Electric Building. That as to the traffic in the elevators in said building, probably sixty per cent of said traffic was that of employees of this plaintiff, but that on the elevator on which I was injured the traffic thereon consisted almost entirely of employees of the defendant. That the elevator upon which I was hurt was one going to the basement and was a freight and passenger elevator running three floors, but that the public did not have any chance to get into this elevator except occasionally an expressman going in or out might use it.

[95]

There were exhibits introduced at this trial as follows:

PLAINTIFF'S EXHIBIT No. 2.

“In the Circuit Court of the State of Oregon, for
the County of Multnomah.

No. —.

JAMES A. FREEBOROUGH,

Plaintiff,

vs.

PORTLAND RAILWAY, LIGHT & POWER
CO., a Corporation,

Defendant.

COMPLAINT.

Plaintiff for cause of action against defendant
complains and alleges:

I.

That during all the times herein mentioned, the
defendant was and now is a corporation organized
under the laws of the State of Oregon; that among
other things, the defendant is the owner of a build-
ing in the City of Portland used as an electric sub-
station and office building; that in connection with
the operation of said sub-station and building, the
defendant owns and operates an electric-driven ele-
vator of the Otis type, which is used in said building
for handling freight from the basement thereof to
upper stories of said building, and said elevator is
also used for passengers; that said elevator is oper-
ated by an operator who controls the movement
thereof by pulling cables.

II.

That during all the times herein mentioned, the plaintiff was in the employ of the defendant as an electrical machinist; that on October 4, 1923, plaintiff was, engaged in removing for repair, an electrical motor from the basement of said electric building, which had been placed in the carriage or floor of the elevator-car by other employees of the defendant; that said elevator is small in dimension, and the size of the motor parts being hoisted in the elevator were so large, that there was comparatively small space in said carriage for the plaintiff and the operator thereof to stand in.

III.

That plaintiff was steadying the parts of said motor, and as he was so doing, plaintiff's right foot was caused to slip on the floor of said carriage, so that [96] it projected slightly beyond the edge of the car and into a vacant space between the side of the car and the enclosure of the elevator-shaft, and by reason of the negligence of the defendant hereinafter set forth, plaintiff's right foot was crushed between the foot and the knee to such an extent that plaintiff's right leg was amputated about seven inches below the knee.

IV.

That defendant, in maintaining and operating said elevator was negligent and careless, and did not exercise every care and precaution which was practicable to use in this—that between the carriage of said elevator and the shaft in which the elevator travels, there was a space between the edge of the

elevator carriage and the wall from six to nine inches; that eye-beams of the building project out into said space between the basement and the street level; that it would not have impaired the efficiency of the said elevator to have walled in said space so there would be no danger of a person becoming caught between the side of the elevator and the said eyebeams; that in addition thereto, the said carriage of said elevator was not closed in; that it was practical to have closed in the sides of said elevator, and by closing the same, it would not have impaired the efficiency of said elevator carriage; that as a direct and approximate result thereof, when plaintiff's foot slipped, the same became caught between the floor of the elevator-car and the eye-beam of said building, hereinbefore alleged.

V.

That plaintiff was capable of earning as a mechanic, the sum of \$200.00 per month; that by reason of his said injuries, plaintiff has lost four months from his work and labor, to his damage in the sum of \$800.00, and plaintiff will lose two months additional time before he will be able to perform any work and labor, to his damage in the further sum of \$400.00; that plaintiff has suffered great physical pain and mental anguish, and personal injury and loss of earning, to his further damage in the sum of \$25,000.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Twelve Hundred and no/100 (\$1200.00) Dollars, and for the further sum of Twenty-five Thousand and no/100

(\$25,000.00) Dollars, and for his costs and disbursements incurred herein.

WM. P. LORD,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, James A. Freeborough being first duly sworn, do depose and say that I am the plaintiff in [97] the above-entitled action; and that the foregoing complaint is true as I verily believe.

JAMES A. FREEBOROUGH.

Subscribed and sworn to before me this 16th day of February, 1924.

WM. P. LORD,
Notary Public for the State of Oregon.
My commission expires Dec. 29, 1924.”

PLAINTIFF'S EXHIBIT No. 3.

“Portland, Oregon, November 14th, 1923.

To the State Industrial Accident Commission of the
State of Oregon, Salem, Oregon.

Notice is hereby given you that the undersigned, a corporation organized under the laws of the State of Oregon, and qualified to transact business within the State of Oregon, and being engaged in a business or occupation comprehended within the scope and meaning of Chapter 112 of General Laws of Oregon for the year 1913, and filed in the office of the Secretary of State, February 25th, 1913, and approved by the people of the State of Oregon under the referendum on November 4th, 1913, elects not

to contribute to the Industrial Accident Fund created by said act, and not to come within the purview of said act, but the undersigned hereby notifies you that it will not be obligated by said act or any provision or provisions thereof.

PORTLAND RAILWAY, LIGHT AND
POWER COMPANY.

By F. I. FULLER,
Vice-President.

[Seal]

Attest: C. N. HUGGINS,
Assistant Secretary.

State of Oregon,
County of Marion,—ss.

We, William A. Marshall and E. E. Bragg, Commissioners of the State Industrial Commission of Oregon, do hereby certify that the foregoing notice of rejection, dated November 14, 1913, has been compared with the original and that it is a true and correct copy thereof and the whole of such original notice [98] of rejection as the same appears on file at the office of the State Industrial Accident Commission of Oregon.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed the seal of said Commission this 8th day of January, 1925.

[Seal]

WM. A. MARSHALL.
E. E. BRAGG." [99]

That prior to the beginning of the trial the said defendant Insurance Company made a request for the Court to make findings of fact, conclusions of law and a judgment order, as follows:

REQUESTS FOR FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDG-
MENT ORDER.

Now comes the defendant in the above-entitled action and in view of the fact that this action is tried before the Court without a jury and that a jury has been waived hereby requests the Court to make the following findings of fact and conclusions of law and judgment order herein, these requests being filed with the Court prior to the submitting of the cause to the Court for consideration:

FINDINGS OF FACT.

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, organized and existing under the laws of Great Britain, is a subject of Great Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action ex-

90 *Employers Liability Assur. Corp. Ltd., etc.,*
ceeds Three Thousand Dollars (\$3,000.00), exclu-
sive of costs and interest. [100]

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00.) against damages resulting from bodily injuries accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained, provided said injury, or claim or expense was within the provisions of said policy.

V.

That the policy of insurance entered into between the said parties is as is alleged in the complaint in Exhibit "A" attached thereto and that the said policy is hereby referred to and made a part of these findings.

VI.

That the said policy mentioned has at all times since April 29, 1922, been in full force and effect.

VII.

That the freight elevator located in said Electric Building, and whereon and in connection with which

bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item 3 of the declaration of said [101] Exhibit "A."

VIII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floors of said elevator and the side walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

IX.

That immediately upon the happening of said accident the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant refused so to do and denied any and all liability on account of or growing out of said accident.

X.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his said injuries, resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19, 1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XI.

That immediately thereafter, on February 19,

1924, this plaintiff delivered said complaint and summons to the defendant and requested it to defend said suit in accordance with the terms and provisions of said Exhibit "A." [102]

XII.

That thereafter, on February 23, 1924, this defendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIII.

That the said plaintiff in said action of Freeborough against the said plaintiff filed a confession of judgment in favor of the said Freeborough whereby the said plaintiff herein confessed judgment in the sum of \$8,000.00 in the Circuit Court of the State of Oregon for the County of Multnomah and that judgment of \$8,000.00 was entered in said cause in favor of James A. Freeborough and against the said plaintiff herein, which judgment was one based upon a confession of judgment.

XIV.

That immediately thereafter this plaintiff demanded of the defendant that it satisfy said judgment to the extent of \$7,500.00 and that it reimburse this plaintiff for said expense of \$500.00, incurred by the plaintiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its denial of any and all liability arising or growing out of said accident.

XV.

That upon the refusal of the defendant to settle and satisfy said judgment to the extent of \$7,500.00, this plaintiff did, on July 10th, 1924, in the necessary protection of its property from sale upon execution, settle and pay said judgment by the payment to the said James A. Freeborough of \$7,500.00 in cash and by the delivery to him of an order for future surgical and medical service by the surgical and medical staff of this plaintiff.
[103]

XVI.

That upon the happening of said accident to the said James A. Freeborough the plaintiff herein immediately called an ambulance and took the said Freeborough to the St. Vincent Hospital in the City of Portland, Oregon, where a surgeon of the plaintiff herein administered medical and surgical relief, including the amputation of the limb of the said Freeborough as the condition of said Freeborough immediately demanded and that the ambulance and hospital expense incurred and paid by the said plaintiff in said medical and surgical relief to the said Freeborough amounted to \$169.75; that the surgeon of the plaintiff and the one who performed the said services was employed by the plaintiff as its general surgeon on an annual retainer to administer surgical and medical relief to the employee of the plaintiff and that the plaintiff did not pay its said surgeon any additional sum for the surgical and medical relief administered to the said Freeborough, but that said surgical and

medical relief was administered to the said Freeborough by said surgeon in the performance of his manual retainer contract with the plaintiff; that the reasonable value of the services rendered to the said Freeborough by said chief surgeon of the plaintiff was the sum of \$250.00.

XVII.

That the plaintiff before commencing this action herein demanded payment of the defendant of the amount demanded in the complaint filed in this action and that this defendant refused to pay the said amount or any part thereof.

XVIII.

That the building where the accident happened to the said Freeborough was in Portland, Oregon, known as the Electric Building, which was at the time and still is owned by the plaintiff herein and that the said James A. Freeborough was an employee working and employed by the said defendant and that the said Freeborough's [104] principal place of employment was not in the said Electric Building where he was injured but was in a machine-shop belonging to the plaintiff located at some distance from the Electric Building, in which machine-shop power-driven machinery was used.

XIX.

That the said James A. Freeborough was not engaged in the maintenance, care and upkeep of the building known as the Electric Building where he was injured, which was the building mentioned in the policy of insurance herein.

XX.

That the salary of the said James A. Freeborough working for the said plaintiff at the time of the said accident was not included within the \$6,000.00 mentioned as estimated remuneration of employees mentioned in Item 3 of the declarations, being a part of the policy of insurance referred to herein.

XXI.

That the plaintiff has paid \$7,500.00 upon said judgment and no more.

XXII.

That the said James A. Freeborough who was employed in the machine-shop where power-driven machinery was used had been ordered by some superior of his to go to the Electric Building, a building also belonging to the plaintiff herein, to procure a piece of machinery for the said plaintiff herein, which service in procuring the said machinery was in the general course of his employment and that while the said James A. Freeborough was getting said piece of machinery for the purpose of taking the same from the said Electric Building to the machine-shop as herein described, he used an elevator in the Electric Building which elevator was one of the elevators described in the said policy of insurance marked Exhibit "A" and attached to the complaint and [105] received an injury to his leg necessitating the amputation thereof above the ankle.

XXIII.

That no premium was charged with respect to any employee of the said plaintiff save and except

a premium of five per cent for every \$100.00 of those engaged in the maintenance, care and upkeep of the Electric Building, which estimated remuneration was \$6,000.00.

XXIV.

That by the terms of said policy the only employees of the plaintiff whose injury or death were covered under the said policy of insurance, which is marked Exhibit "A" in the complaint herein, were those specified in said policy, to wit: those engaged in the maintenance, care and upkeep of the Electric Building.

XXV.

That at the time of the execution of the said insurance policy marked Exhibit "A" and attached to the complaint and at the time of the accident to the said James A. Freeborough and at all times mentioned in the complaint there was in full force and effect within the State of Oregon a Workmen's Compensation Law which governed and prescribed and established the rights, duties and obligations of the plaintiff herein and the said James A. Freeborough and that by the terms of said policy sued upon herein, it was provided that the said policy did not cover injuries to any employee of the plaintiff under any workmen's compensation act or law and that the said Freeborough, at the time of his alleged injury, was an employee of plaintiff and working under and by virtue of the terms of the Workmen's Compensation Law of the State of Oregon. [106]

XXVI.

That James A. Freeborough was a person not covered by all or any of the terms of said policy of insurance herein referred to.

XXVII.

That James A. Freeborough was an employee under the Workmen's Compensation Law of the State of Oregon during all of the times in plaintiff's complaint and herein mentioned.

XXVIII.

That there was no duty upon the defendant to investigate the accident referred to in plaintiff's complaint or to defend plaintiff against any claims or actions presented or brought by said Freeborough against plaintiff herein or to pay or satisfy any judgment secured by said Freeborough against the plaintiff herein.

XXIX.

That plaintiff herein has not at any time acted in the best interest of defendant herein.

XXX.

That no premium was paid by plaintiff to defendant for the purpose of covering any employees of plaintiff other than those referred to and specified in Item 3 of said policy, to wit: those engaged in the maintenance, care and upkeep of the building (Electric Building) and Freeborough was not an employee engaged in the maintenance, care and upkeep of said building.

CONCLUSIONS OF LAW.

Based upon the findings of fact found hereinabove, the Court finds as a matter of law: [107]

I.

That at all the times mentioned in the complaint and at the time of the execution of the said policy of insurance and at the time of the accident complained of in the complaint there was in full force and effect within the State of Oregon a Workmen's Compensation Act or law which governed, prescribed and established the rights, duties and relations of plaintiff with the said Freeborough and that by the terms of said policy of insurance sued upon it was stipulated and agreed between the plaintiff and defendant herein that the said policy of insurance referred to in the complaint should not cover injuries to any employee of the plaintiff under any Workmen's Compensation Law and that the said Freeborough was at the time of his alleged injury an employee of the plaintiff under said Workmen's Compensation Act or Law of the State of Oregon and that by reason thereof the injuries to him referred to in the complaint herein were not covered by the terms of said policy of insurance.

II.

That the Workmen's Compensation Act or Law of the State of Oregon was in full force and effect at the time of the accident mentioned in the complaint herein and at the time of the execution of said policy and that certain and various terms of

the said Workmen's Compensation Act or Law governed the rights, duties, relations and obligations between the said plaintiff and the said James A. Freeborough and this defendant and that by reason thereof the injuries to the said James A. Freeborough were not covered by the policy of insurance mentioned in the complaint, the said Freeborough being an employee of the said plaintiff herein. [108]

III.

That the said James A. Freeborough, being an employee of the said plaintiff herein, was not covered by the said policy of insurance mentioned in the complaint nor was the said plaintiff covered on account of the accident to the said James A. Freeborough for the reason that the said James A. Freeborough, under Condition A of the said policy, was an employee of the assured plaintiff herein and that the employees of the said plaintiff herein were not covered except as is described in Item 3 of the declarations attached to said policy and that such employees as were covered were those engaged in the maintenance, care and upkeep of the building.

IV.

That the said James A. Freeborough was an employee of the assured, plaintiff herein, under the Workmen's Compensation Law of the State of Oregon and his injury in the Electric Building belonging to the plaintiff was not covered by the policy of insurance mentioned herein in the complaint and there is no liability as against the said defendant herein on account thereof.

V.

That the said James A. Freeborough was not an employee of the defendant engaged in the maintenance, care and upkeep of said building and was not covered by said insurance policy mentioned in the complaint and that this said defendant is not liable for any accident happening to the said James A. Freeborough on account of said policy executed to the plaintiff herein.

VI.

That the said defendant is not liable to the said plaintiff herein on account of the accident to the said James A. Freeborough under the policy of insurance mentioned in the complaint and that the evidence in this case and admissions made by the respective parties in the pleadings or otherwise do not show [109] any liability as against this defendant.

VII.

That the defendant herein has not at any time breached any term, covenant, condition or provision of said policy of insurance herein referred to and mentioned in plaintiff's complaint as Exhibit "A" thereto attached.

JUDGMENT ORDER.

Based upon the findings of fact and conclusions of law herein, this Court finds that the said defendant herein is not liable to the said plaintiff under the insurance policy mentioned in the complaint and that the said plaintiff herein has failed to sustain the issues in the complaint and a judg-

ment is hereby entered in favor of the defendant and against the said plaintiff and that the said defendant herein recover its costs and disbursements from the plaintiff. [110]

That prior to the submission of this cause to the Court, the said defendant in error submitted to the Court proposed findings of fact, conclusions of law and a judgment order as follows:

[Title of Court and Cause.]

FINDINGS OF FACT.

I.

That the plaintiff is a corporation created and existing under and by virtue of the laws of the State of Oregon. That since the execution of the contract hereinafter pleaded, the plaintiff has changed its corporate name from its then name of Portland, Railway, Light and Power Company to its present name of Portland Electric Power Company.

II.

That the defendant is a corporation chartered, created, and existing under the laws of Great Britain is a subject of Great [111] Britain, is a citizen of England and is authorized to do business in the State of Oregon by reason of its compliance with the laws of Oregon pertaining to foreign corporations.

III.

That the amount in controversy in this action exceeds Three Thousand Dollars (\$3,000.00), exclusive of costs and interest.

IV.

That the plaintiff is the owner of a building known as the Electric Building, located at the Northeast corner of Broadway and Alder Streets in the City of Portland, Oregon. That on April 29, 1922, the plaintiff and defendant entered into a certain contract of insurance, attached to the complaint as Exhibit "A" whereby the defendant undertook to insure the plaintiff to the extent of Seven Thousand Five Hundred (\$7,500,00) Dollars against damages resulting from bodily injuries accidentally sustained by a single person, while within or upon the freight elevator located in said Electric Building, and, in addition, against such expense as might be incurred by the plaintiff for such immediate surgical or medical relief as might be imperative at the time such injuries might be sustained.

V.

That said contract, except for the breaches of the defendant as hereinafter alleged, is now and has been at all times since April 29, 1922, in full force and effect and this plaintiff has complied with each and every condition thereof by it undertaken. [112]

VI.

That the freight elevator located in said Electric Building, and whereupon and in connection with which bodily injuries resulted to James A. Freeborough, as hereinafter alleged, is specifically described in Item III of the declarations of said Exhibit "A."

VII.

That on October 4, 1923, James A. Freeborough was injured while riding upon said elevator and his right foot was crushed between the floor of said elevator and the side walls of the elevator shaft, so that it became and was necessary to amputate his right leg above the ankle.

VIII.

That at the time and place of said accident, the said James A. Freeborough was a person covered by the terms of said Exhibit "A" under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit "A," to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent of \$7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom. [113]

IX.

That immediately upon the happening of said accident, the plaintiff notified the defendant and requested that it investigate such injuries and settle any claims resulting therefrom, in accordance with the provisions of Exhibit "A." The defendant re-

fused so to do and denied any and all liability on account of or growing out of said accident.

X.

That upon the happening of said accident the plaintiff incurred ambulance and hospital expenses for the imperative, immediate, medical and surgical relief of the said James A. Freeborough, in the aggregate sum of One Hundred Sixty-nine Dollars and Seventy-five Cents (169.75); that it was imperative that surgical and medical services should be rendered to the plaintiff and such medical and surgical services, of the reasonable value of Two Hundred and Fifty Dollars (\$250.00) were rendered, by the chief surgeon of the plaintiff to the said James A. Freeborough; that the said chief surgeon of the plaintiff was employed by the plaintiff at an annual salary or retainer, to render surgical and medical aid to the employees of the plaintiff and under said contract and annual retainer the said medical and surgical services were rendered to the said James A. Freeborough without additional cost to the plaintiff.

XI.

That thereafter, on February 17, 1924, the said James A. Freeborough filed a suit against the plaintiff in the Circuit Court of the State of Oregon for Multnomah County, for the recovery of damages growing out of his [114] said injuries resulting to him as the proximate result of the negligence of this plaintiff in the construction and operation of said elevator; that thereafter, on February 19,

1924, said complaint, together with summons in regular form, was duly served upon the plaintiff.

XII.

That immediately thereafter, on February 19, 1924, this plaintiff delivered said complaint and summons to the defendant and requested it to defend said suit in accordance with the terms and provisions of said Exhibit "A."

XIII.

That thereafter, on February 23, 1924, this defendant returned said complaint and summons and again denied any and all liability arising or growing out of said accident.

XIV.

That the allegations of said complaint charging the negligence of this plaintiff as the proximate cause of his injuries were true, and the sum of \$8,000.00 was a fair and reasonable compensation for the injuries and damages resulting to said James A. Freeborough from and on account of said accident.

XV.

That thereafter, acting in the best interest of both the plaintiff and defendant herein, this plaintiff as defendant in said suit, filed in said court and cause its confession, whereby it confessed judgment in the sum of \$8,000.00 and thereafter on June —, 1924, a judgment [115] in the sum of \$8,000.00 was duly entered in said cause in favor of said James A. Freeborough and against this plaintiff as defendant therein.

XVI.

That immediately thereafter this plaintiff de-

manded of the defendant that it satisfy said judgment to the extent of \$7,500.00 and that it reimburse this plaintiff for said expense of \$500.00, incurred by the plaintiff in the imperative surgical and medical relief of the said James A. Freeborough at the time of said accident. This defendant refused to so satisfy said judgment or to so reimburse this plaintiff and reiterated its denial of any and all liability arising or growing out of said accident.

XVIII.

That in so denying liability under said Exhibit "A" and in refusing to investigate said accident and in refusing to settle the claims of the said James A. Freeborough to the extent of \$7,500.00, as provided by said Exhibit "A," and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of \$7,500.00, as provided in said Exhibit "A," and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen Dollars and Seventy-five Cents (\$419.75), this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of [116] surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and

Seventy-five Cents (\$7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75), or any part thereof.

Based upon the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit "A," under Agreement I thereof and was not a person excluded by the terms of agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit "A," to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, to wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents (\$419.75), and to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident [117] alleged in the complaint and covered by the said policy of insurance.

II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of said James A. Freeborough, to wit, in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents (\$419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars (\$7,500.00), violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75).

III.

That the plaintiff should recover judgment of and from the defendant in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75), together with its costs and disbursements herein.

CHAS. E. WOLVERTON,

Judge. [118]

[Title of Court and Cause.]

JUDGMENT ORDER.

Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five

Cents (\$7,919.75) together with its costs and disbursements hereinafter to be taxed.

CHARLES E. WOLVERTON,
Judge.

March 1, 1926. [119]

That prior to the trial the said Insurance Company, defendant, filed objections to the findings of fact and conclusions of law and judgment order, proposed by the plaintiff, Electric Company.

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER REQUESTED BY PLAINTIFF.

Now comes the defendant herein by its attorneys, and objects to certain of the findings of fact, conclusions of law and judgment order as submitted by the plaintiff herein.

OBJECTIONS TO FINDINGS OF FACT.

The defendant objects to the findings of fact as follows:

I.

Paragraph VIII is objected to for the reason that the said proposed findings do not state the facts in the case nor are the facts as stated in said proposed findings justified by any admissions of the defendant herein or by any testimony adduced at the trial.

II.

The defendant objects to all of the findings in Paragraph X of said proposed findings of fact except the defendant admits that upon the happening of the accident, the said plaintiff incurred an am-

balance and hospital expense for the relief of James A. Freeborough in the sum of \$169.75 and admits that the medical services in the amputation of the leg of said Freeborough and services thereafter were reasonably worth \$250.00 and admits that the chief surgeon of the said plaintiff who performed the medical services for the said Freeborough was employed by the plaintiff as an [120] annual salary or retainer to render surgical and medical aid to all of the employees of the plaintiff under said contract and annual retainer and that the medical and surgical services rendered by such surgeon were rendered to the said Freeborough under said annual retainer without additional cost to the plaintiff and that as to all of the facts as proposed by the said plaintiff herein under Paragraph X except as is admitted herein, are not founded upon any admissions of the defendant herein or justified by the evidence.

III.

This defendant objects to the findings of fact as proposed by the plaintiff as stated in Paragraph XIV for the reason that the said finding is not justified by any of the admissions of the defendant or by the evidence introduced herein.

IV.

That the defendant objects to the finding of fact in Paragraph XV of the findings of fact proposed by the plaintiff except the defendant admits that the said plaintiff herein did, in June, 1924, confess a judgment against the plaintiff herein and in favor of James A. Freeborough for the sum of

\$8,000.00 and that the judgment was entered upon such confession.

V.

This defendant objects to Paragraph XVIII of the findings of fact proposed by the said plaintiff for the reason that the same is not justified by the admissions of the defendant herein nor by the evidence submitted in this case except that the defendant admits that it has refused to pay to the plaintiff herein the sum of \$7,919.75 or any part thereof. [121]

OBJECTIONS TO CONCLUSIONS OF LAW.

I.

This defendant objects to the conclusions of law proposed by the plaintiff herein in finding I for the reason that such conclusion of law is not justified or warranted by the evidence submitted or by the admissions of the defendant herein.

II.

This defendant objects to the conclusions of law proposed by the plaintiff herein in finding II for the reason that such conclusion of law is not justified or warranted by the evidence submitted or by the admissions of the defendant herein.

III.

This defendant objects to the conclusions of law proposed by the plaintiff herein in finding III for the reason that such conclusion of law is not justified or warranted by the evidence submitted or by the admissions of the defendant herein.

OBJECTION TO JUDGMENT ORDER.

This defendant objects to the judgment order proposed by the plaintiff herein for the reason that said judgment order is not justified by the findings of fact nor by the conclusions of law as hereinabove set forth and for the further reason that said judgment order is not justified by the evidence introduced at the trial of this action nor by any admissions of this defendant and for the reason that said proposed judgment order is contrary to the facts and is contrary to the law and is not justified by either the facts or the law.

WHEREFORE the defendant asks the above-entitled court to enter findings of fact and conclusions of law and the judgment order as prayed for by the defendant herein and that a judgment [122] be entered denying any relief to the plaintiff herein and that this action be dismissed with costs and disbursements to the defendant.

Respectfully submitted,
WILBUR, BECKETT, HOWELL & OP-
PENHEIMER,

Attorneys for Defendant. [123]

That a judgment was rendered against the said defendant herein on the 1st day of March, 1926, as follows:

(Title of Court and Cause.)

“Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from

the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents (\$7,919.75) together with its costs and disbursements hereinafter to be taxed.

CHAS. E. WOLVERTON,
Judge.”

That the within and foregoing, pursuant to an order of this Court, is in substance all of the evidence and the only evidence introduced at the trial of said cause and contains a full and complete and correct transcript of all the proceedings in substance at the trial of the said cause and the same is herewith tendered in this court within the time allowed by law.

This defendant prays that this bill of exceptions may be allowed settled and signed by the Court.

Dated April 9th, 1926.

WILBUR, BECKETT, HOWELL & OP-
PENHEIMER,

Attorneys for Defendant.

The foregoing bill of exceptions *and* heretofore lodged with this Court is hereby settled and allowed as the bill of exceptions for use in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to a writ of error issued in this cause and this is to certify that the foregoing bill of exceptions contains in substance all of the evidence and proceedings at the trial of the above-entitled cause.

Dated this 12th day of April, 1926.

CHAS. E. WOLVERTON,

Judge of the United States District Court for the
District of Oregon.

Filed April 12, 1926. [124]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the annexed writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from four to one hundred and twenty-four, inclusive constitute the transcript of record upon said writ of error in a case in said court in which the Portland Electric Power Company, a corporation, is plaintiff and defendant in error and the Employers Liability Assurance Corporation Limited of London, England, a corporation, is defendant and plaintiff in error; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said plaintiff in error, and is a full, true and complete transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$523.90, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 1st day of May, 1926.

[Seal]

G. H. MARSH,
Clerk. [125]

[Endorsed]: No. 4857. United States Circuit Court of Appeals for the Ninth Circuit. The Employers Liability Assurance Corporation Limited of London, England, Plaintiff in Error, vs. Portland Electric Power Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed May 3, 1926.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

